SUPREME COURT OF QUEENSLAND

CITATION:	*Sally James v USM Events Pty Ltd* [2022] QSC 63
PARTIES:	**SALLY JAMES** (plaintiff) **v** **USM Events Pty Ltd** (defendant)
FILE NO/S:	BS 1129/20
DIVISION:	Trial Division
PROCEEDING:	Civil
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	14 June 2022
DELIVERED AT:	Brisbane
HEARING DATE:	24, 25, 26, 27, 28, 29 May 2021 Further submissions – 4 June 2021, 8 June 2021 Further hearing – 7 April 2022
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. The parties are to provide a draft order by which the defendant is to pay the plaintiff damages, having checked the calculations in [562] of these reasons, within fourteen days of the date of these reasons.** **2. The parties should provide submissions as to costs within fourteen days of the date of these reasons.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – where plaintiff claims damages for physiological and psychological injuries suffered while competing in a duathlon organised by the defendant – whether the plaintiff's injury, if any, was suffered as a result of the collision with the para-athlete – whether the scope of the duty owed by the defendant extended to the plaintiff – whether the defendant breached the duty of care owed – whether any breach by the defendant caused an

injury to be suffered by the plaintiff

TORTS – NEGLIGENCE – DEFENCES – OBVIOUSNESS – OBVIOUS RISK – whether risk of collision between an able-bodied athlete and a para-athlete would have been obvious to a reasonable person in the position of the plaintiff – whether voluntary assumption of risk

TORTS – NEGLIGENCE – DEFENCES – INHERENT RISK – whether risk of collision between an able-bodied athlete and a para-athlete was a materialisation of an inherent risk in the conduct of the duathlon

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – Where the defendant claims the plaintiff was contributorily negligent – whether the plaintiff was contributorily negligent and what apportionment should be allotted

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – Where the plaintiff suffered physical injuries, including cervical spine and lumbar spine injuries, and psychological injuries – Where damages assessed pursuant to the *Civil Liability Act 2003* (Qld)

Acts Interpretation Act 1901 (Cth) s 2C
Australian Constitution s 109
Competition and Consumer Act 2010 (Cth) ss 87E, 87ZA,139A, Sch 2, 2, 3, 15, 60, 61, 64, 137C, 236, 237, 267, 275
Consumer Guarantees Act 1993 (NZ) ss 28, 29
Civil Liability Act 2003 (Qld) ss 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 59, 60
Civil Liability Regulation 2014 (Qld) Sch 4
Civil Proceedings Act 2011 (Qld) s 61
National Disability Insurance Scheme Act 2013 (Cth) ss 11, 103, 104, 106, 108, 109, 111, 116
Trade Practices Act 1974 (Cth) s 74
Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth)
Uniform Civil Procedure Rules 1999 (Qld) rr 5, 149, 157, 376

AB by her tutor Mb v State of New South Wales [2018] NSWSC 765, cited

Agar v Hyde (2000) 201 CLR 552, cited
Alameddien v Glenworth Valley Horse Riding Pty Ltd (2015) 324 ALR 335, considered
Anderson v Mount Isa Basketball Association Incorporated [1997] QCA 340, cited
Blatch v Archer (1774) 1 Cowp 63, cited
Castle v Perisher Blue Pty Ltd [2020] NSWSC 1652, cited
Collins v Clarence Valley Council (2015) 91 NSWLR 128, considered
Coles Supermarkets Australia Pty Ltd v Bridge [2018] NSWCA 183, cited
Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd (formerly t/as Stork Food Systems Australasia Pty Ltd) (2009) 254 ALR 661, cited
Felhaber v Rockhampton City Council [2011] QSC 023, cited
Klein v SBD Services Pty Ltd [2013] QSC 134, cited
Let's Go Adventures v Barrett [2017] NSWCA 243, considered
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319, cited
Menz v Wagga Wagga Show Society Inc (2020) 103 NSWLR 103, cited
McQuilty v Midgley & Anor [2016] QSC 36, cited
Moore v Scenic Tours Pty Ltd (2020) 268 CLR 326, considered
Motorcycling Events Group Australia Pty Ltd v Kelly (2013) 86 NSWLR 55, cited
Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471, cited
Nicolich v Webb [2019] WADC 58, cited
Nucifora & Anor v AAI Limited [2013] QSC 338, cited
Perisher Blue Pty Ltd v Nair Smith (2015) 90 NSWLR 1, cited
PWJ1 v The State of New South Wales [2020] NSWSC 1235, cited
Rickhuss v Cosmetic Institute Pty Ltd (No 2) [2020] NSWSC 393, considered
Roads v Traffic Authority of NSW v Dederer (2007) 234 CLR 330, considered
Rootes v Shelton (1967) 116 CLR 383, considered
Rossi v Westbrook & Anor [2013] QCA 102, cited
Scenic Tours Pty Ltd v Moore (2018) 361 ALR 456, considered
Sharp v Home Care Service of NSW [2018] NSWSC 1319, cited
Singh v Lynch (2020) 103 NSWLR 568, cited
Sutherland Shire Council v Heyman (1985) 157

CLR 424, cited
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2020] NSWSCA 263, considered
Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited [2021] HCATrans 190, cited
The State of Queensland v Kelly [2015] 1 Qd R 577, cited
The Thistle Company of Australia Pty Ltd v Bretz & Anor [2018] QCA 6, cited
Thompson v Woolworths (Queensland)Pty Ltd (2005) 221 CLR 234, cited
Towers v Hevilift Ltd [2020] QSC 77, cited
Trevali Pty Ltd (trading as Campbelltown Roller Rink) v Haddad (1989) Aust Torts Reports 80-286, considered
Uniting Church in Australia Property Trust (NSW) v Miller (2015) 91 NSWLR 752, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422, cited
Van Gerven v Fenton (1992) 175 CLR 327, cited
Wade v J Daniels Associates Pty Ltd [2020] FCA 1708, cited
Wilson v Nilepac Pty Ltd (t/as Vision Personal Training) Crows Nest [2011] NSWCA 63
Whisprun Pty Ltd (formerly Northwest exports Pty Ltd) v Dixon (2003) 200 ALR 447, cited
Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, cited
Wyong Shire Council v Shirt (1980) 146 CLR 40, considered

COUNSEL: M Grant-Taylor QC with G C O'Driscoll for the Plaintiff
A P Collins for the Defendant

SOLICITORS: Travis Schultz & Partners for the Plaintiff
Carter Newell Lawyers for the Defendant

Background

[1] The applicant, Dr Sally James ("**Dr James**"), had, after some years of personal difficulties, determined to change her lifestyle, lose weight and become fit. One of the ways she determined to do this was taking up participation in triathlons. She completed her first triathlon in March 2016 at Mooloolaba. She subsequently competed in a number of triathlons which included the Gold Coast Triathlon – Luke Harrop Memorial ("**GCT**") in 2017. In February 2018, she competed in the GCT held at Mitchell Park, Broadwater Parklands at Southport. Due to water conditions, the event was changed to a duathlon the day before the race. It, therefore, only involved a run leg, a cycling leg and a further run leg. Dr James was disappointed as swimming was her strongest sport. However, given she had already travelled to the Gold Coast she decided to compete on 25 February 2018. While undertaking the return leg of the first run leg, she was running into the Broadwater carpark area with a number of people. She heard yelling and swearing that startled her. She was knocked over by para-athlete in a racing wheelchair, Mr Bill Chaffey. She remembered Mr Chaffey, ricocheting out of his wheelchair and hitting the ground but little else. That is said to have resulted in a brain and psychiatric injury as well as some other relatively minor injuries.

[2] The defendant, USM Events Pty Ltd ("**USM**"), was the organiser and operator of the event. USM does not dispute that it owed Dr James a duty of care but does dispute the extent of the duty owed. The issue for this court is whether the injuries suffered were caused as a result of any breach of duty by USM, and if so, the extent of the injuries suffered.

[3] Dr James sues USM claiming damages for negligence and as a result of a breach of Section 60 of the *Australian Consumer Law* ("**ACL**"),[1] which is pleaded as an implied term of the contract.

[4] USM accepts that it owed a duty of care to avoid the foreseeable risk of injury to Dr James in relation to the event. That was largely where any agreement in relation to the issues of the case ended. It, however, disputes the extent of the duty of care pleaded by Dr James and that it breached any duty of care. USM has raised a number of defences based on obvious and inherent risk and that Dr James had voluntarily assumed the relevant risk by entering the competition. It is also alleged Dr James' damages should be reduced for contributory negligence. There is also significant dispute as to what, if any, injuries were suffered by Dr James as a result of the collision with Mr Chaffey on that day and the effect that that has had on her ability to work. In addition to disputes as to the quantum of damage in terms of the injuries suffered and Dr James ability to return to work, there is a dispute as to whether the damages should include a payment to the National Disability Insurance Agency ("**NDIA**") in anticipation of the NDIA seeking recovery of the payment of monies and whether future expenses should be calculated by reference to the payment provided under the NDIS plan. There is also an issue as to how Dr James' bankruptcy is appropriately dealt with in terms of damages, if at all.

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[1] Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ("**CCA**").

[5] The issues that must be decided in relation to this matter are as follows:

(a) the extent of any duty of care owed and whether there was a breach of that duty by USM;

(b) whether any breach by USM caused an injury to be suffered by Dr James;

(c) do any of the defences under the *Civil Liability Act 2003* (Qld) ("**CLA**") apply;

(d) what was the injury suffered by Dr James, if any, as a result of the collision with the para-athlete;

(e) what is the appropriate quantum of damages;

(f) should damages be reduced as a result of Dr James failing to take reasonable care for her own safety;

(g) has Dr James established a claim under s 60 of the ACL on the basis that the service of providing an event was not rendered with due care and skill; and

(h) if a claim can be made under s 60 of the ACL, do any of the defences under the CLA apply or is there any other matters which would exclude liability or limit the quantum and how is damages to be calculated.

[6] Issues arose at the end of the trial as to the pleading of the purported cause of action under the ACL, whether Dr James could raise a case based off USM's knowledge of Mr Chaffey, and a contention that there could be a painted line between the para-athletes in wheelchairs and other athletes.

[7] Prior to considering the above issues, I will consider the evidence.

Uncontroversial facts

[8] The following facts were admitted in the pleadings or subsequently were accepted as uncontroversial in final submissions.

[9] USM was experienced in the design and conduct of triathlons and conducted the holding of such events as a business for profit. USM has regard to Triathlon Australia's Event Operations Manual, which does not provide for any specific width for a course when there is a combined able-bodied and para-athlete event. USM had held combined events prior to the present.

[10] There were multiple categories of competitors to allow elite competitors to compete in the GCT as well as all members of the community of all ages including people with disabilities. Competitors paid an entry fee to compete. The rules of competing in triathlons in Australia which applied were primarily the Triathlon Australia Race Competition Rules (the "**Rules**").

[11] Participating athletes had been sent an Athlete Information Guide in relation to the event in January.[2]

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2 Exhibit 47.

[12] The GCT had been designed in 2017 with some further insubstantial adjustments in 2018 in preparation for the course being used for the Commonwealth Games. Hosting the triathlon involved a process of seeking permits from the Department of Transport and Main Roads ("**DTMR**") as well as working with the Queensland Police Service ("**QPS**") and the Council.

[13] The course had however changed from the course originally designed for the triathlon to a duathlon just prior to the GCT.

[14] According to Ms Daamen, another competitor, athletes were notified of the decision to change the event to a duathlon on the afternoon before the event, via Facebook and email. Dr James was sent an email notifying of the change of course. I accept that Dr James did not however, become aware of the decision until the morning of the competition. By the time of the GCT Dr James had been competing in triathlons for almost two years.

[15] As a result of the course being changed from a triathlon to a duathlon:

(a) the athletes completed the course in an anti-clockwise as opposed to a clockwise direction;

(b) the swim leg was removed;

(c) there were two run legs, one of two and a half kilometres followed by the cycle leg of 20 kilometres and a final run leg of five kilometres (which required the running of the two-and-a-half-kilometre leg twice); and

(d) Dr James' category was the sprint category which changed from wave starts (as occurred in the GCT for the swim leg) to rolling starts in each category.

[16] The change to the course which was announced over a public speaker system approximately every five minutes as new athletes moved to the starting area.[3] At least some athletes were told the afternoon before of the change. The GCT was an all-age event with amateur and elite triathletes of all ages and was open to para-athletes.

[17] If the event had proceeded as a triathlon, able-bodied athletes and para-athletes would have been on the course at the same time.[4]

[18] The para-athletes were generally part of the overall wave start but started at the beginning of wave starts.[5] With the change to the duathlon, the para-athletes still started using a 'wave start' but the remaining event for able-bodied athletes in the sprint category were started by 'rolling starts.' According to Ms Van Pooss, the para-athletes in wheelchairs were started earlier to minimise the time they were on the course with the able-bodied athletes.

[19] The rolling starts would have increased the number of athletes on the course at least at the start and for a period thereafter. There is a natural dissipation of athletes over time on the course.

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3 Affidavit of Rebecca Laura Van Pooss sworn 27 May 2021 ("**Van Pooss Affidavit**") at [68(a)].
4 Van Pooss Affidavit at [73].
5 T4-91/30-36; Exhibit 46.

[20] The duathlon involved athletes of varying abilities and the category in which Dr James was competing consisted of 1,271 athletes, however there were up to 1,462 athletes spread across the course with the para-athlete and enticer categories of athletes having had earlier starts. The 1,271 athletes in the sprint category commenced rolling starts at 8:13am, with Dr James commencing at 8:33am.[6]

[21] USM accepts that given both the para-athletes and able-bodied athletes had to complete the same two and a half kilometre run leg of the course twice, there was a probability that some of them would come across each other on the last leg. The cycling course was separate.

[22] In the area where the incident occurred the athletes had turned left on an angle from Marine Parade and then after 30 to 40 metres of proceeding in a straight line, there was an 's' shaped curve which narrowed to five to six metres for 30-40 metres with curbing on the left and barriers to the right (the "**s-bend**"). After proceeding through the s-bend, the athletes on the first leg proceeded in a generally straight path to the transition area, whereas those on the final leg had to make a turn to travel towards the finishing line.

[23] There were barriers to separate the running field and the cyclists as they entered into Mitchell Park and the s-bend. There was a combination of witches' hat cones or crowd control barriers to point the demarcation in key position points to separate outbound and inbound runners.[7] There were no barriers or other separation devices positioned on the course to separate para-athletes from able-bodied athletes.

[24] Dr James did fall in the first leg of the run as a result of a collision with Mr Chaffey. He was on the final leg of the race and travelling at significant speed. There is little doubt he was seeking to overtake runners, including Dr James, when the accident occurred. As a consequence of the collision, he flew through the air and crashed into the barriers separating the cyclists from the runners.

[25] This judgment, out of necessity and only because of the issues involved, makes a distinction between para-athletes in wheelchairs and able-bodied athletes[8].

Disputed facts

[26] A brief summary of principal relevant facts which are in dispute include the following;

(a) the circumstances in which the collision between Mr Chaffey and Dr James occurred (the incident);

(b) whether Dr James was travelling two abreast of two other runners and not keeping to the race line at the time of the collision;

(c) whether Dr James stepped to the right in response to calling out by Mr Chaffey as he came behind;

(d) whether Dr James stumbled forward after the collision prior to falling:

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6 Van Pooss Affidavit at [37].
7 T5-28/38-43.
8 Which is consistent with the terminology adopted by the parties.

(e) whether Dr James hit her head and momentarily lost consciousness after the collision;

(f) what Mr Chaffey was doing in the lead up to the accident;

(g) whether Dr James knew or ought to have known that para-athletes in wheelchairs were competing on the course at the same time as her event and were likely to be in proximity to her on the run leg;

(h) whether Dr James knew that there was a risk of a contact with a para-athlete in a wheelchair as a result of which she may trip and fall;

(i) whether USM knew of the risk of a collision between para-athletes in wheelchairs and other runners who were able-bodied and the risk of injury;

(j) whether the use of barriers to separate para-athletes in wheelchairs and other athletes who were able-bodied on the run leg were capable of being safely used on the s-bend;

(k) any injuries suffered as a result of the collision; and

(l) the circumstances in which Dr James ceased to work as a psychologist and when.

Dr James' version of events

[27] Dr James gave evidence. The credibility of her evidence was strongly in issue.

[28] Dr James was 55 years of age at the time of trial. She was 51 at the time of the accident. She was an able sportswoman. After immigrating to Australia, she married in 2000 and in 2006 gave birth to twin boys.

[29] Between 1989 and 1993 Dr James had worked for Westpac Bank as a Customer Service Officer. She then commenced a Bachelor of Arts in Leisure Management at Griffith University. She took an elective in sports psychology and determined that she wished to become a psychologist. She commenced a Bachelor of Behavioural Science at Griffith University in 1994. Throughout her studies she continued to engage in sport. She graduated with a bachelor's degree in psychology with Honours. In 2004, she was awarded a doctorate in clinical psychology. She also obtained certificates in exercise fitness and nutrition.

[30] Dr James had worked as a psychologist in multi-disciplinary clinics. After graduating she moved to the Sunshine Coast in 2005 and worked at a school and a clinic in Brisbane, then shifted to a multi-disciplinary clinic on the Sunshine Coast as well as having some academic roles. In 2012, together with other practitioners, she established the Centre for Positive Change. She had particular expertise in working with children with autism spectrum disorders and Asperger's and also travelled to Brisbane to work for one and a half days a week in 2013.

[31] In 2017, she had developed a program called Mind Body Wellness Program, which was a mixture of personal training, nutrition and psychology. She had, prior to the accident, intended on focusing on developing that and gave workshops and engaged in doing retreats. She was hoping to work three days a week in order to balance it with her boys going to high school.

[32] She was involved in the Australian Psychologists' Society and was voted in as Chair in January 2018 for the Sunshine Coast branch.

[33] Dr James was diagnosed with attention deficit hyperactivity disorder ("**ADHD**") in 2012 by Dr Cash.[9] She had no major health issues prior to 2018, although she had suffered an inflammation near her shoulder in 2016 which resolved.

[34] In 2014, Dr James' marriage broke down. As a result of that and the stress she was under, she gained a lot of weight and was drinking reasonably heavily until she decided to turn her life around in 2015. She did certificates in exercise which gave her a personal training certificate. After that, Dr James engaged in exercise, nutrition, sleep and meditation to restore her health.

[35] As part of her personal health program, Dr James began training for triathlons in 2016. After Dr James had competed in the Mooloolaba triathlon in March 2016, she found that she loved the sport and began to train semi-seriously and continued to participate in triathlons up until February 2018. In 2016 and 2017, she particularly engaged in Gatorade triathlons and performed strongly in her age group. She also engaged in the GCT, the Mooloolaba triathlon and the Noosa triathlon. Since the incident at the GCT in 2018 she has not participated again in triathlons.

The accident

[36] As to the accident in question, the 2018 GCT course was proposed to be substantially the same as the 2017 course. The 2017 GCT involved a swim of 750 metres, 20 kilometres on the bike and five kilometres on the run leg. The course was intended to be used for the Commonwealth Games later in 2018.

[37] According to Dr James, the weather leading up to the 2018 GCT was very wet. She drove down to the Gold Coast the day before. She registered on the Saturday for the triathlon which was to occur on the Sunday and took all her preparatory steps. She checked her phone and emails before she went to bed. Her coach, Mr Dimitri Simons, texted her with her time for a wave start. She did not see any information from the organisers informing her that the triathlon had changed to a duathlon.

[38] On the Sunday morning she carried out her usual routine before competing in the race. She did not think she would have checked her emails, but she would have checked her text messages to see if her children had texted her. She got a text from the coach asking where she was at approximately 6.10 am when she was on her way to the course. When she arrived at the venue, her coach informed her that the event had changed to a duathlon.

[39] Changing from a triathlon to a duathlon meant that the swim leg would no longer occur and that there would be a short run leg at the start of two and a half kilometres, the cycling leg of 20 kilometres and then a final run leg of five kilometres. The course was to be undertaken in an anti-clockwise rather than clockwise direction.

[40] Traditionally, the race would commence with a wave start for the various categories. However, that was altered such that the runners were started using a

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[9] She was also treated for premenstrual dysphoric disorder.

staggered start in pairs, which were supposed to be five seconds apart although that narrowed to two to three seconds at one stage until it was realised that the starts were too close together.

[41] Dr James was not happy with the change because the swim leg was her strongest and she was a slow runner. She stated there were a lot of people there and she could hear people calling out categories. She changed into her running shoes and pumped up her bike tyres and was doing a warmup when she heard her age category being called for the start. Each category was based on age and was identified by hat colour. According to Dr James, it was a bit chaotic with lots of people in the start area. She lined up with another woman who was in the category after her. They were told to go and as they left the starting line, they threw their hat into the bin. Dr James said she started running and just followed all the other runners when the incident occurred.

[42] Dr James said they had to run out of the carpark, up onto Marine Parade and then went up and followed a turnaround point at the end. She said there was a large number of people there. She was surprised to see a visually aided athlete on the course. She was on the return leg of the first run, past point 34[10] on the map of the course which was Exhibit 1 and proceeded to the bend which was marked 50-106 on Exhibit 1. She was following everybody. She said there were lots of people around her. She said that there was a bush area where it was marked 40-49 and she could not see around the corner. She was keeping her line which was on the left because she was a slow runner. It was not in contention that there was an informal protocol whereby runners stayed to the left and passed on the right.

[43] As Dr James came around the bend marked 50 on the course map,[11] she heard somebody yelling to "Get the fuck out of the way. Move out the fucking way" very loudly behind her and the use of other rather colourful language. She recalled being startled. She then saw a man in a wheelchair ricocheting across her right-hand side, flip out and hit the ground on her right-hand side. He was later identified as Mr Chaffey. Evidence from both parties indicated that he was an elite athlete who competed at a high level. Dr James described what she saw in the following way:[12]

> "And I see him flip out, right, what I called – I texted my friend afterwards – ricochet, flip out and then hit the ha – the ground – the concrete really hard. I couldn't see his legs. I've never seen anyone in a wheelchair like that before. Never in my life have I seen – you know, in a race seen anyone like that. But his legs were underneath, and so when he was on the floor he was all, like, you know, crumpled up. I seen that and then I don't have much else memory, apart from what I'd call an out-of-body looking down at the … para-triathlete … and then the next memory I've got is I've got a memory of him coming back towards me… I've got no recollection of what happened between him crashing his - crashing his wheelchair. And

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10 Exhibit 1. The map was not apparently available before the race, and it was not established whether or not it was to scale.

11 Exhibit 1.

12 T 1-4/5-19.

> then the next picture I've got is him coming back towards me, where the number 7 is on that line" [of the venue map].[13]

[44] Dr James identified herself as the lady on the ground in a photograph taken shortly after.[14] Mr Chaffey was also on the ground. Dr James could not recognise the other competitors in the photograph. One of them was Ms Daamen who also gave evidence. Dr James could recall being passed by quite a lot of young people. The cyclists in the photograph were divided by a barrier and were on a different part of the course. She recalls there was a lot of noise. She was trying to get around the corner and get into transition and finish that part of the course. She recalls a lot of people around her, more than she had experienced in previous races.

[45] She could recall Mr Chaffey coming back swearing after the turnaround. She thinks he missed the exit to the finish.

[46] According to Dr James, she was not aware that the course she was competing on was simultaneously occupied by para-athletes in wheelchairs, nor that had been the case in prior GCTs, including in the GCT in 2017. Her recollection was that in 2017 the para-athletes competed the day before. Ms Van Pooss' evidence was that para-athletes in wheelchairs had competed on the course with able-bodied athletes in 2017. There was also a separate unrelated event run by USM the day before where the para-athletes in wheelchairs competed separately from other athletes.

[47] Dr James' recollection after the incident was patchy. USM contends the lack of memory was exaggerated. Dr James stated that she had a memory of being on her bike and being scared because there were lots of people going fast. She could not recall what occurred in the transition between the run and the bike. She recalls when she got off the bike after the bike leg feeling pain in her back and putting her shoes on and running out. The last leg was five kilometres which involved two laps. Her only recollection was at some point in the run leg she walked because her back was hurting. She recalls getting to the recovery area and lying on the ground looking at the sky. She recalls seeing her coach, getting her bike and walking down the highway for a while with her coach. She recalls driving home and having tinnitus in both ears. She does not recall arriving home. She said the tinnitus started straight after the accident and has continued to the present time.

[48] Dr James sent an email to Triathlon Australia to complain about the course on Sunday 25 February 2018.[15] That email said, *inter alia*:

> "It was at the end of the first run when I was running into the carpark area towards the transition area that I was hit and knocked to the ground by a para-triathlete moving at a very fast speed in his racing wheelchair. I was entering a bend on a downward slope when the accident occurred. I heard was the para-triathlete shouting before he hit me. I was knocked hard to the ground and sustained injuries. What was most distressing to me was to witness the para-triathlete in his wheel chair ricochet into the side barrier, flip over and the man fall out onto the tarmac. I ran over to his aid, but other people were

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13 Exhibit 1.
14 Exhibit 2.
15 Exhibit 5.

> lifting him up and putting him back into his wheelchair. He was swearing and shouting at everyone and continued to do so as he took off in his wheelchair. I believe the commentator saw some of this incident as he made a comment about the para-triathlete falling out of his wheelchair in the past.
>
> My complaint is about the safety of the course and allowing Para-triathletes to race in super vast [sic] vehicles with typical triathletes.
>
> Both the run and bike course were very narrow to accommodate such a vast number of triathletes let alone with para-triathletes racing in wheelchairs at 30kph. Because of this I was shouted at, knocked over, injured and witnessed another para-triathlete crash terribly – the may could of hit his head and died. This incident impacted on my overall race performance, I completed the raced with injury and great emotional distress. I will (sic) [16] be able to finish the triathlon season, finish the gatorade series and participate in the Mooloolaba Triathlon. It is possible I may not compete again. I am devastated by today's incident, my complaint is a bid to ensure the same situation does not occur again or a fatality occur. The entire course was poorly times, planned and unsafe…"

[49] Triathlon Australia directed her to contact Ironman Oceania. She sent them a similar email.[17] She received a phone call from Rebecca Van Pooss after sending the email. Dr James stated that she can remember the conversation because she wrote it down. Dr James recalled Ms Van Pooss was very apologetic. She enquired after Mr Chaffey and said she was told by Ms Van Pooss "He goes very fast. He goes hard. He always comes out of his wheelchair." [18] She said Ms Van Pooss was laughing which she thought was inappropriate. Ms Van Pooss told Dr James that Mr Chaffey was fine. She told Ms Van Pooss that she thought she had injuries to her shoulder, and she could not compete in a Gatorade triathlon at Mooloolaba. Ms Van Pooss told her that they would refund her for that race and pay her medical expenses. She then received an email from her. I accept that the conversation she described with Ms Van Poos occurred. It was not challenged in cross-examination. Ms Van Poos agreed that the conversation had occurred and did not dispute its contents save that she would not have spoken of Mr Chaffey in a disrespectful way.

[50] The email sent by Ms Van Pooss on 28 February 2018 to Dr James stated:

> "As discussed on the phone we had calculated the timing on releasing athletes as a rolling start based on the number we had competing and the time we needed everyone to have completed the course to still meet our road reopening times. This rolling start should have reflected what course conditions would have been as a triathlon format. At some point during the rolling start the time between starting athletes was shortened by a couple of seconds which had a considerable impact to the flow of athletes on to the course and the conditions they then faced out there. Unfortunately by the time we realised there had been a miscommunication amongst

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16 Given the sentence that followed it appears that the word "not" was omitted.
17 See Exhibit 3.
18 T1-50/1-8.

> the team we were unable to rectify the situation as athletes had already started. Had this shortening of the spacing not occurred the course would have much better catered for the number of athletes and different formats we had racing. … Once again I'd like to apologise to you for your race experience on the Gold Coast."[19]

[51] Dr James subsequently received refunds for the fee paid to participate in the Mooloolaba triathlon.

[52] According to Ms Van Pooss in her evidence, the email was badly worded and after looking at the data she considered the course could cater for the number of athletes on the course. I will consider that in the context of Ms Van Pooss' evidence.

[53] Dr James did not recall very well how she felt three days after the incident. She stated that her physical injury that was of most concern was her left clavicle which she had previously injured in the Raby Bay triathlon. She still had tinnitus in her ears. She said it was painful on the back of her head at the crown on the left side. She also recalled that she had some sore on her left bum cheek area and lower spine:[20]

> "But not so sore that I couldn't walk or anything. It was just sore, and my head was throbbing, and my ears were, you know, tinnitus all the time."

[54] On the Sunday after the event, she discovered and took a photo of her leg which showed bruising on the right lower leg.[21]

[55] She stated she went back to work in the week following 25 February, although had no recollection of it.

[56] Dr James described her time back at work as being surreal. She said it was a challenge because she had a sore head. She was vague and trying to apprehend what she was being told and trying to do counselling, but nothing worked. She found it very hard to focus and listen because she had a sore head. According to her "Everything was just not right."

[57] The tinnitus continued and still does. It alternates between being very low pitched and very high pitched.

[58] She saw her General Practitioner ("**GP**") Dr Chant, soon after the incident. She states that Dr Chant advised her to return to work to keep her brain active but reduce her caseload. Dr James said she could not remember being told that but said that her medical records referred to the recommendation to reduce her patient load to four to six patients a day.

[59] According to Dr James, Dr Chant referred her to the psychiatrist who had previously diagnosed her with ADHD, Dr Cash. Dr Cash referred her to a psychologist, Dr Hall, for cognitive therapy, because she was having flashbacks of Mr Chaffey crashing. Dr Hall told her he thought she had concussion. Dr James

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19 Exhibit 3.
20 T1-52/10-13.
21 Exhibit 4.

also saw a sports medicine doctor, Dr Dwyer, for her collarbone injury. She was also referred by Dr Dwyer to a physiotherapist, Mr Hill. Neither Dr Cash, Dr Hall or Dr Dwyer were called to give evidence.

[60] Dr James was subsequently referred by Dr Cash to a neuropsychologist, Dr Georgius, because she had said she was having trouble with words and memories. Dr Georgius told Dr James that she had a traumatic brain injury ("**TBI**") and that she should keep working but reduce her clients to two to three clients in the morning. She recommended that she go into post-traumatic stress disorder ("**PTSD**") treatment. Dr Georgius gave evidence in the proceeding.

[61] In September, she saw Dr Hinds, Dr James' GP after she changed from Dr Chant and was closer to home. She had gone to see him because she was having difficulties in September 2018 which she describes as suffering vicarious[22] trauma when she was speaking to clients. He put on a medical certificate that she was unfit to practice.

[62] Dr James was worried about developing PTSD. Dr Georgius apparently recommended to Dr Cash that Dr James engage in a PTSD program. That is supported by Dr Georgius' report.

[63] Dr James thought she should close her practice because she was not getting well so she could focus on getting well. She stopped taking new clients, stopped doing public presentations and was just seeing her long-term clients. She informed patients she was going to close her practice. She provided referral information. She said some patients she could not refer on at that point because they were at different points in their treatment and needed reports done or had complicated cases such that she continued to work in a very reduced capacity.

[64] As a result, she started to experience financial difficulties and get behind with her credit card payments, a loan and a debt to the Department of Health which required her to pay $250 a week.

[65] Dr James reduced her clients between September and November. It was a point of controversy as to when Dr James said she ceased to see patients. While in her evidence in court she stated it was in November, the statement of loss and damage (as amended) referred to her ceasing to see patients in September 2018. Dr James suffered significant cross-examination in relation to the disparity.

[66] As Dr James found she could not meet her debts at the time, she accessed money from family and her superannuation to pay for medical support. She stated she got to a point where she could not see her way out of her financial difficulties, so she decided to file for bankruptcy in November 2018.

[67] Dr James undertook the three-month outpatient program for PTSD at Buderim private hospital from December 2018. Her expectation was that she would "fix myself like a good psychologist, and I would return to work after the program."[23] She stated she worked really hard in the program. She said that while she benefitted

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22 Which she referred to as "vicatious" originally.

23 T1-66/19-20.

a lot from the program, listening to other people's trauma in group work gave rise to her having images and flashbacks from their trauma.

[68] According to Dr James, the program did not result in her reducing the symptoms to the level such that she did not still meet the criteria for PTSD.

[69] Dr James was also referred to Ms Callaghan, a physiotherapist who specialised in vestibular dysfunction, following her having spatial difficulties, getting dizzy and having vertigo when walking her dog. According to Dr James, Ms Callaghan told her that she had a TBI post-concussion syndrome with vestibular "something" and visual processing difficulty. She was not called to give evidence.

[70] Dr James was on Centrelink payments for a while and then received a disability support pension. Dr James also applied for total and permanent disability benefits through her superannuation which was ultimately successful. She also applied for the National Disability Insurance Scheme ("**NDIS**") in 2019. She was accepted as a participant in January 2020. Documents in relation to Dr James' earnings and the benefits she received were admitted in evidence.[24] She confirmed the schedule of expenses prepared by her solicitors.[25]

[71] Dr James was extensively cross-examined. Dr James made a number of concessions when she gave evidence.

[72] Dr James agreed that triathlons were an inclusive process where athletes of various standards were invited to compete.

[73] Dr James agreed she received competitor's guidelines for the events which was standard for participating in USM events.

[74] According to Dr James, she travelled as fast as she could, but on the inside because she was not a fast runner. She stated that if you came across somebody who was running slower than you, they would pass you on the right-hand side. She understood that to be the protocol amongst competitors. She said her usual practice was that she would keep to the left because she was a slower runner.

[75] Dr James did not agree that she was not surrounded by a lot of other athletes on the first leg and leading up to when the incident occurred. Dr James stated that because there had been a rolling start, where according to her recollection there was only a gap of two metres between runners as they took off in pairs, people were far more bunched up than they were in a triathlon. In Dr James' experience, the swim leg tends to separate people a lot further, as it is the first leg of a triathlon.

[76] Dr James accepted that the incident took place two kilometres and three hundred metres into the run. USM contends that the crowd would have dissipated in the course by the time that the accident occurred which was on the return stretch of the first leg of the run, near white chevrons seen in the photographs. While Dr James stated that was normally the case, she did not agree that was the case in the 2018 GCT. She stated there were a lot of people bunched up together. At least in one of

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24 Exhibit 6.
25 Exhibit 7.

the photographs of the accident, there seems to be Mr Chaffey, Dr James and three or four other people.[26]

[77] It was ultimately uncontentious that the area where the incident took place is estimated to be five to six metres wide. The bike riders were separated from the runners and para-athletes by aluminium barriers (which Mr Chaffey had collided with when the incident occurred).

[78] In Dr James' experience, she had never been clipped by a runner or run into from behind when undertaking a triathlon but accepted it was a risk. According to Dr James, that was because on a triathlon people were more spread out.

[79] Dr James could not recall para-athletes being on the 2017 Gold Coast triathlon course and recalled watching them the day before competing separately from able-bodied athletes in 2017. That was in fact verified by Ms Van Pooss insofar as a separate competition had taken place in 2017 the day before the GCT. Photos taken from the 2017 competition[27] and video evidence showed para-athletes finishing with able-bodied athletes. There was evidence that para-athletes were competing on the same day as able-bodied athletes in Mooloolaba, Noosa and the GCTs in 2016-2018.[28] Dr James however maintained that she had not previously seen para-athletes in wheelchairs on the course at the same time she was on the course and did not see any para-athletes in the rolling start of the duathlon. She did not recall that there were able-bodied athletes and para-athletes in the same course for the 2016 Noosa triathlon or Mooloolaba triathlon for the sprint category in which she was competing.

[80] Given the relatively small number of para-athletes in wheelchairs who had an earlier start, Dr James' evidence that she did not see them is credible, particularly in the absence of evidence of details of the number of para-athletes in wheelchairs who competed and the time they competed indicating to the contrary. While Ms Daamen gave evidence she had been on a course on some occasions with para-athletes in wheelchairs, her evidence was of a general nature. There was some support that the change in the course and arrangements resulting in the able-bodied athletes and para-athletes in wheelchairs was out of the ordinary insofar as Ms Lisa Groom, one of the athletes who assisted Mr Chaffey back into his chair, commented to Dr James in a text message that she considered that "the whole change of plan when they dropped the swim meant it was crazy that we were all concentrated on the course together with the wheelies. I had a couple of other close calls with them but they were trying to avoid people too. I'm sure they would have complained to the organizers as it was a dangerous situation for all." Ms Groom was not called to give evidence, however the text exchange was admitted into evidence.

[81] Ms Groom also made a suggestion in her text that after Mr Chaffey had yelled "to the right" Dr James may have stepped to the right.[29] Dr James could not recall one way or another whether she stepped to the right in front of Mr Chaffey and his wheelchair.

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26 Exhibit 2.
27 Exhibit 48.
28 Exhibit 46.
29 Exhibit 13.

[82] The expert called on behalf of Dr James contended that able-bodied athletes and athletes in wheelchairs should not be on the course at the same time. USM particularly focussed on that being Dr James' case. However, according to Dr James her objection was not to the fact that para-athletes in wheelchairs were on the course, although she could not recollect that having happened previously, but the fact that there was insufficient room for both the able-bodied athletes and para-athletes in the turning part of the course where her fall occurred. In her view, if there had just been able-bodied athletes there would have been sufficient room for them to move safely around the bend, but that was not the case with the para-athletes in wheelchairs as well.

[83] Dr James stated in cross-examination that she has no recollection of the point of impact on the course. She had no recollection of running three abreast or any recollection of overtaking anybody. Her recollection was that she remembered there was a load of bushes and as she came around the corner, she heard Mr Chaffey shouting and that was it. She has no memory as to what actually occurred at the point of impact.[30]

Credit

[84] Dr James was extensively cross-examined as to credit.

[85] USM submits that the court should conclude that Dr James engaged in a selective process of recalling or reconstructing events in an attempt to maximise certain issues which she perceives are beneficial to her case. In particular, USM relies upon:

(a) Dr James' evidence that para-athletes had never previously participated in an event with able-bodied triathletes, including those in which she had competed;

(b) that Dr James reverted to the fact that she has a brain injury when she could recall considerable detail about events leading up to the race and her initial participation and other matters post-injury, but not specific details about events and work she performed after the injury. In particular, USM contended that the evidence as to the O reports showed a determined effort by Dr James to avoid disclosing that type of information because it would reveal her capacity far beyond what she was communicating to the court and medical experts. USM contends Dr James deliberately stated that she had ceased clinical practice in September 2018 in the statement of loss and damage when it was not true;

(c) the failure to call her coach, Mr Dimitri Simons, with whom she spoke after the event and Dr Cash, her treating psychiatrist;

(d) her evidence as to her dealings with the Commonwealth Department of Health, as a result of which she agreed to repay money where her explanation was said to lack credibility and casts doubt upon the credibility of all of her evidence; and

(e) the disclosure of her treatment of treating the O children and providing reports after the time she was said to have ceased practice as a psychologist in

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30 T2-64.

the statement of loss and damage casts doubt upon the credibility of all of her evidence, particularly in terms of the effects of any injury she suffered.

[86] According to Dr James, USM's submission suffers from the fact that:

(a) it was not demonstrated by any objective evidence that Dr James' evidence that she was not aware that para-athletes in wheelchairs competed in triathlons;

(b) USM did not put to Dr James that the result of her collective injuries would not have an effect upon her memory;

(c) Dr James undertook a three-month PTSD course, never returned to work, has been bankrupted, has the care of her two children and as a result of not being able to meet rent had to move back with her husband from whom she was separated, all of which indicate that it is unlikely she has engaged in an elaborate ruse to succeed in this litigation; and

(d) it was not put to the experts that the existence of the O reports in late 2018 indicated she had the capacity of returning to work.

[87] I generally found Dr James to be an honest witness and accept her version of events in relation to the lead up to the incident with Mr Chaffey and the symptoms she suffered thereafter., There were some aspects of her evidence which were unreliable or caused me to be circumspect. I accept her evidence and recollection were genuinely afflicted by her medical condition. That is supported by expert evidence which I discuss below. Her evidence was not therefore always reliable given her patchy recollection of the incident and what occurred afterwards. However, that said, she generally did not seek to give self-serving answers in relation to the conduct of the event and was prepared to make concessions.[31]

[88] On occasion I did consider that she did seem to revert to having a brain injury when questioning became stressful to her, such as the questioning in relation to the structure of her business and the employment of other psychologists said to result in money being paid back to the Department of Health by her.[32]

[89] The evidence showed she saw patients from the O[33] family in November 2018 and December 2018 and had provided relatively detailed reports to the GP which were dated 30 December 2018, specifically a "Ten Session Psychological Report". USM contends that showed a deliberate intention to inflate her claim and that she had deliberately withheld the fact that she had seen the patients and written a report until she was told that USM had subpoenaed a particular doctor, who was their referring practitioner.

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31 For example, T1-80/1-12; T2-31/24-31; T2-35/30-35; T2-38/20-29; T2-39/14-20; T2-108/38-41; T3-51/1-35; T3-66/10-26.

32 For example, T3-65/39-40; T2-87/41-42 "I have a lot of brain fog and a lot of mental fatigue when it came to those sort of details".

33 The names have been anonymised given the personal medical information of those individuals. Accordingly, the children and relevant reports are referred to as the 'O children' and the 'O reports' respectively herein. Dr James also saw a Victims Assist client in November 2018 which she disclosed.

[90] Dr James' evidence-in-chief had indicated that she had reduced her patients right down in September through to November, but not that she had stopped seeing patients altogether, notwithstanding that her statement of loss and damage referred to September 2018 as the end date. Her explanation for the omission is that she had not recalled treating them and the fact that they had not been recorded through the Medicare printout because they had paid cash. She stated that the three children had been having ongoing treatment with her which she had to finalise. She stated the statement of loss and damage was a typo and it should have been November 2018.

[91] Dr James swore an affidavit prior to trial providing an explanation as to her non-disclosure of details of work that had not been disclosed prior to her accident and provided further records and schedules.[34] She blamed her difficulties with memory and lack of record keeping. She stated it was possible there was still work she may have performed but which she did not recall. It was generally consistent with her evidence given in cross-examination.

[92] I accept Dr James did not recall having done the work in relation to the O children given she was undertaking the PTSD program at Buderim hospital in December 2018, and there were a significant number of consultations after September 2018. I consider however, Dr James' evidence that the reference to "September 2018" was a typographical error which should have been "November 2018", was not credible. I consider she sought to put that forward to deflect cross-examination knowing that the September 2018 date was not correct. However, I am not prepared to infer that the lack of reference to the O children in her disclosure was deliberate to inflate her claim. The consultations are relatively small in number, and their omission would not have escalated her damages in any significant way. While Professor Whiteford and Dr Bell both found her ability to produce the reports surprising given the symptoms described by her to them, they did not say that the condition did not afflict her memory in such a way that her explanation for failing to recollect was not consistent with her condition. Professor Whiteford considered the writing of the reports was inconsistent with what she had described to him in terms of her loss of capacity at the end of 2018. While he did not suggest it caused him to revisit his opinion in its entirety, he was clearly circumspect.

[93] Dr Georgius was not cross-examined about whether the reports on the O children changed her opinions, even though she was the expert who had carried out an extensive assessment of Dr James to determine whether she had suffered brain damage. She had, however, had found no cognitive impairment notwithstanding she considered Dr James had suffered a TBI as a result of the accident and considered that a large number of her symptoms were due to a psychological injury. It is also evident from Dr Georgius' second assessment that as time went on and Dr James did not feel she was recovering, she became more anxious about her mental state. That together with this litigation is likely to have distorted her recollection and caused her to exaggerate symptoms to some extent but not significantly.

[94] There was also an attack upon her in relation to her claiming for bankruptcy. It was suggested by USM that her filing for bankruptcy and strategic and on advice, which was rejected by Dr James. There was medical evidence from Dr Georgius supporting the fact that she was advised that she should stop seeing patients. It

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[34] Exhibit 54.

would also be an extreme act given she was divorced and had two sons. Her ceasing to work and filing for bankruptcy not only affected her but her sons. To the extent that there is a suggestion that she had deliberately filed for bankruptcy to elevate her claim I do not accept it.

[95] The most concerted attack against Dr James was in relation to a debt to the Department of Health of some $103,610.65. That was in respect of claims that were made from Medicare using Dr James' provider number, which had to be repaid. According to Dr James, notwithstanding the services were provided by psychologists employed by her, the services had been claimed using her Medicare number, rather than their individual numbers. She further stated that she did not have access to those psychologist's files who had been subcontractors to her, in order to demonstrate to Medicare that the services had been provided. Her explanation was jumbled and not particularly persuasive but was reasonably consistent given she was cross-examined about it at length and was not demonstrated to be untrue by any objective evidence. Her explanation however, as to why she did not protest to the department or appeal their decision which was attributed to the accident the following year, was not credible given the 2018 incident occurred after this time. However, the submission of USM that because of Dr James' illogical explanation for why money was owed to the Department of Health, the court should take the view that that tainted her evidence overall, when the events concerned took place prior to the accident occurring, seeks to take the matter too far.

[96] There is no doubt, the dealings with the Department of Health were a matter of sensitivity to Dr James and she was uncomfortable in revisiting the events however she was not unresponsive. The events cast doubt on the reliability of her financial records and management skills, but it is a long leap to suggest that fact alone or together with the non-disclosure of the O children consultations demonstrated she was dishonest and none of the evidence she gave should be accepted as being credible. I do not find that none of her evidence was credible.

[97] However, it must be borne in mind that there was objective evidence that an accident occurred at the GCT where Dr James appeared to be at least clipped by Mr Chaffey's wheelchair well after the agreement was reached with the Department of Health. While she has seemingly suffered significant injuries from an incident after which she had got up and finished the race there was medical evidence provided to support it. While it is true, as a number of doctors accepted, that their reports relied on what they were told by Dr James, the cross-examination did not show any significant inconsistency in what they were told by Dr James and her evidence in this court.

[98] However, I given I have found some exaggeration in the evidence given and some minor untruths, I have been careful to assess her evidence and have done so by reference to how it related to each of the issues which the court has to decide and considered it having regard to the evidence as a whole.

[99] As to her recall being patchy after the incident, despite the fact she could recall details prior to the accident, the only medical practitioner who suggested that was disingenuous was Dr Atkinson. Dr Georgius, the neuropsychologist, thought it was consistent with her condition. While on occasion when she was being heavily

cross-examined, she reverted to "I can't remember" or "I have a brain injury", there was no discernible pattern as there were a number of facts that she could not recall that were of no significance. To the extent it is suggested that the lack of memory was contrived to tailor the medical diagnoses in her favour I do not accept it. Her patchy recall was consistently the subject of complaint by her to the medical experts, the majority of which accepted it was consistent with her injuries. Dr James was distressed and, in some respects, appeared obsessed by the fact she had diagnoses of a TBI and PTSD, notwithstanding she had been given assurances by Dr Georgius that she did not suffer cognitive impairment. It was clearly a source of angst, as was apparent from her anxiety about having cognitive problems and not recovering when she saw Dr Georgius . Dr James' lack of memory, while consistent with some of the diagnoses given by medical experts, was not always to her advantage. In some respects, it would have been more advantageous to her case if she positively remembered things such as the details of the accident and how she fell. While it was positively put to Dr James that she had deliberately not disclosed the work done with the O children to inflate her claim, it was not put to her that she did not suffer from a lack of memory from her injuries. Regardless, I am not satisfied that she was engaging in a selective process of recalling or reconstructing events in an attempt to maximise her case.

[100] Dr James did make appropriate concessions, accepting that litigation was a stressor in her life[35] and also did not seek to overstate the current state of her physical injuries when asked in cross-examination.[36]

[101] Consistent with her description of having difficulty with finding the right words she did also give answers using wrong words in evidence where she agreed with the correction, such as "vicatious" rather than "vicarious"[37], but not in a way which appeared to be contrived. While she did give a lot of detail of her life leading up to the incident, her evidence was given in a very open way where she appeared anxious with a level of detail consistent with being very open and authentic, albeit on occasion irrelevant. Some of the detail about her personal life exposed Dr James 'warts and all'. Her evidence was given in a way that appeared to be a stream of consciousness, rather than being contrived or dishonest. She made some spontaneous comments to herself including for example, "need a jellybean"[38] and "then I had appendicitis on Christmas day. That wasn't nice."[39] She on occasion also spoke to herself during the course of evidence which was plainly unconscious, such as saying "don't waffle".[40] None of these matters suggest someone who was not genuine in giving her evidence, in not being able to provide detail as to the accident, her personality and approach remained the same and did not suggest it was contrived.

[102] Her complaint as to memory problems and being traumatised from seeing Mr Chaffey had been fairly consistent from the time that she made a complaint to Triathlon Australia and went to see Dr Georgius the first time, prior to litigation

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35 T3-72/37-44; see also for example concession T1-79 that there was no difficulty navigating the course absent Mr Chaffey, and that she was to take care of herself and keep an eye out for other competitors.

36 T3-70/1-15.

37 T1-56/32-36.

38 T1-24/35.

39 T1-30/5-6.

40 T1-31/28; T1-39/11; T2-113/10.

being commenced. Notably Ms Daamen also described being scared at seeing Mr Chaffey hitting the barrier. Similarly, her initial concern to USM, Ms Groom, and to Dr Georgius was expressed primarily being about the safety of the athletes, particularly Mr Chaffey, although that developed into a concern of her own position as result of the accident.

[103] While it was said she continued false assertions that she had not seen para-athletes in wheelchairs competing with able-bodied athletes, I do not accept that was shown to be the case on the evidence for the reasons set out above.

[104] The failure to call Mr Simons, Dr James' trainer who she spoke to after the event, who it is not suggested was a witness to what occurred, does not raise a *Jones v Dunkel* inference. Dr James on her own evidence drove back to the Sunshine Coast that night, even though she could only remember doing so incompletely.

Evidence of Ms Daamen

[105] Ms Daamen was another competitor in the duathlon in February 2018. She had been competing in triathlons for the previous nine years.

[106] She was in the 65-70 age group for the sprint triathlon, which was the same race in which Dr James was competing. Apparently, Ms Daamen's group is the Z group and "after Z you're dead".[41]

[107] According to Ms Daamen, about a month after the race Dr James contacted her and asked her for a witness statement because she said she had acquired a brain injury and PTSD following the incident. She refreshed her memory with the statement prior to giving evidence but had a recollection of what occurred.

[108] Ms Daamen recalled that there were issues being raised about water quality the day before the triathlon. She thought she may have found out the swim leg was cancelled when she went to the registration table the day before, but she said athletes were subsequently informed by email and it was on Facebook that the swim leg would not occur.

[109] Ms Daamen stated that on the day of the duathlon her age group ran at the same time as the over 50s, as there were fewer competitors in their age group. She recalls that the competitors were grouped together and then they would take off two at a time.

[110] Ms Daamen saw an incident occur on the return leg of the two-and-a-half kilometre run towards Mitchell Park. She knew Mr Chaffey but not Dr James. She stated that the last 100 metres before Mitchell Park she thought there was carpeting and an aluminium barrier about head high (as she was sitting). She thought the area was about six metres wide which in her view was ample space for athletes if you followed the rules. By that, she meant that you needed to keep as far left as you can for running and cycling, so faster competitors can overtake you on the right. According to Ms Daamen, "the age groupers and para-triathletes usually compete together but they may have different time schedules for different areas".[42] She

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41 T4-63/36.
42 T4-69/16-18.

stated that her experience of triathlons was that there was no discrimination as to age or in relation to disabilities and they all celebrated as a team.

[111] Ms Daamen said the athletes turned left into Mitchell Park. She stated that she was running at approximately six kilometres per hour. There was a lot of noise with a lot of people cheering. In the distance she could hear rumbling which she thought was the carbon fibre wheels of the wheelchairs. She stated that they are very, very fast and they can turn very easily. According to Ms Daamen, if she heard them coming, she knew to move out of the way. She stated that she had been in that position before, and you would move to the left. She stated that she saw a group of three ladies who were running ahead of her whom she thought were not very competitive.

[112] Ms Daamen did not know if Dr James was with that group of three ladies or not. She stated she heard a wheelchair go past. She must have turned her head. She said she did not actually see the collision, but she thought that Mr Chaffey must have clipped Dr James' right leg with his left wheel. She stated that she did not see anything save that she saw Mr Chaffey go up the wall. She said he catapulted up to the height of the barrier because he was going at such a high speed. The whole wheelchair tipped and then he fell. She thought the barrier was approximately one and a half metres tall. She went over to assist him. Everyone else kept running past except for two other people who also came and assisted Mr Chaffey to lift him back into the chair so he could keep going. She only recognised Mr Chaffey when they got him up. He was just using expletives. According to Ms Daamen he was in a foul mood. She understood he was vying for a position in the Commonwealth Games so the accident would have affected his time. She said it was a very traumatic accident. She had originally thought he would be badly injured.

[113] Ms Daamen did not recognise Dr James in the photograph taken after the accident.[43] Ms Daamen said she recalled the girl with the normal swimsuit because she thought she was probably inexperienced because she did not have a tri-suit on. She wondered whether she understood the rules because she did not understand why she was so far over on the right when other triathletes would have been on the left. Ms Daamen confirmed that Exhibit 43 showed Mr Chaffey collapsing down after having mounted the barrier and Exhibit 44 was her assisting him. Ms Daamen did not recognise either Dr James or Ms Groom in the photograph showing those who also assisted getting Mr Chaffey back in his chair.

[114] She said that Mr Chaffey was going "very, very quickly" when he went past Ms Daamen and was travelling "much, much faster" than she did.[44]

[115] Ms Daamen agreed that anyone who had been standing in the way of the airborne wheelchair would have been knocked off balanced and could have had a fall. She stated that when Mr Chaffey had shot up the wall, he had lost complete control. She agreed that he had slammed into the barrier at very high speed. She said it was scary for her to see.

[116] Ms Daamen did not recognise the three women running together. She did not speak to them after the incident. She said that they were running close together such that

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43 Exhibit 2.
44 T4-79/25-27.

you could not run through them. She did not know if the outside lady of the three was Dr James.

[117] She did not know if one or two of the women were trying to overtake the other. She could not say whether or not Mr Chaffey hit one of the three ladies who was necessarily on the outside because the order could have changed when her attention was drawn away from looking to the front to see them.

[118] Ms Daamen estimated that she saw Mr Chaffey when they were approximately 60 metres from the turnaround and Mr Chaffey would have had approximately 100 metres to go. She stated when she saw the three ladies, she was approximately 10 metres back from them. She thought that they were going at her speed. She observed them for a while. She did not observe them to be overtaking each other.

[119] While there is no doubt Ms Daamen's estimates were genuine, I take them as very approximate in terms of the estimation of distance given there is no yardstick from which to judge the accuracy of the estimates.

[120] Ms Daamen was a very candid and independent witness. To the extent she provided opinions about triathlons, her opinions about the participation of para-athletes and how they were planned, some of which were coloured by her passion for triathlons and the community involved, they can be given little weight. However, her factual observations as to triathlons in which she had competed on a number of occasions and were based on that experience as well as what she observed on the day, albeit not the incident, can be accepted.

[121] While USM contends that based on Ms Daamen's evidence the court should be satisfied that Dr James was on the extreme right of the athletes in front of Mr Chaffey, such that he has come into contact with her attempting to proceed on the outside of her, Ms Daamen could not identify Dr James as one of the three women who she saw in front of her. Nor did she see how the accident occurred. Further, Ms Daamen stated that she was running slowly at about six kilometres per hour and did not think the three women were running much faster than she was. The evidence provided by USM demonstrated that Dr James average was 10.7 kilometres per hour in the first leg. While Ms Groom suggested that there were other competitors around her, she did not suggest that she was travelling in a line with other competitors which is consistent with Dr James' evidence that she was not running with anyone else.

[122] No other evidence was called from anyone who actually competed on the course.

Dr Grigg

Dr Grigg was the expert called by the plaintiff. When asked in cross-examination While Dr Grigg agreed that if hit from behind while running, Dr James could have

[123] Dr Grigg was the expert called by the plaintiff. While Dr Grigg agreed that if hit from behind while running Dr James would have landed a couple of metres from the original point of impact, he said he would not assume that to be the case given the fact that the only visible injury was bruising to the inside of Dr James' right leg, and he doubted that she would have landed very far from the point of impact. Dr Grigg noted that you can stop when travelling at a speed of 10 kilometres per hour. He

considered that a couple of metres would be the distance from the impact to the point of falling, and not more. Dr Grigg considered that Dr James was more or less facing back along the direction she came from such that she had been rotated. He noted she was on her back but did not consider that showed she had rolled over multiple times. Dr Grigg considered the fact that the left rear wheel being flung up into the air was consistent with the fact that it was the wheel which hit Dr James. That was the back wheel. He did not consider it was likely that it was the front wheel while Mr Chaffey attempted a manoeuvre because he would not have tipped the way that he did in the photo.

[124] I accept his evidence in this regard.

Mr Chaffey

[125] The evidence of Mr Chaffey's conduct was primarily given by Ms Daamen with some additional observations being made by Ms Groom in her text.

[126] Ms Daamen's evidence does support the fact that Mr Chaffey was travelling at significant speed when approaching the final leg of the two-and-a-half-kilometre leg to reach the finishing line. USM contends that the collision was caused by Dr James being in the centre of the running path or alternatively, was the result of Mr Chaffey travelling at such speed that he failed to undertake proper steps in order to ensure that there was room to pass Dr James or slow down so as to avoid the collision.

[127] Mr Chaffey was, like Dr James, obliged to abide by the rules. There is no doubt he was travelling at considerable speed as evidenced by the fact he collided with the barrier and flew up into the air after colliding with Dr James. Given he was travelling towards the finishing line and was an elite para-athlete where his finishing time affected his standing to be progress to qualifying for the Commonwealth Games, it is likely he was trying to manoeuvre around the corner as quickly as possible by taking the shortest route to reach the finishing line. While I find he was yelling at the athletes in front of him on the S-bend to get out of the way, given the speed at which he was travelling, that would have given little notice to those in front of him.

[128] Although I accept that Mr Chaffey could see the athletes in front of him, I am not persuaded that the accident necessarily occurred as a result of "reckless" conduct by him as opposed to a misjudgement of his speed and ability to manoeuvre around athletes and the fact that there a number of athletes ahead of him who were likely to be changing positions as they sought to advance their position on the course. However, I do find that the way he was conducting himself in seeking to overtake Dr James at excessive speed and seeking to get back to the race line as quickly as possible was primarily the cause of the collision that subsequently occurred and that he should not have conducted the manoeuvre taking account of the safety of athletes around him at the speed he was travelling. That was so, even if Dr James may have contributed by her being caught off guard by his yelling, such that she may have mis-stepped to the right. That said, the fact that Mr Chaffey is likely to have acted in breach of the triathlon rules in overtaking Dr James and Dr James may have stepped to the right rather than the left, contrary to the protocol which athletes in triathlons abide by, does not alleviate USM of any liability for the incident that occurred, given the competitive environment, which I discuss further below.

Findings of fact as to the collision

[129] Having regard to the evidence including the photographic and video evidence, the text message from Ms Groom and the evidence of Ms Daamen as well as Dr James, I consider what most likely occurred on the day of the incident was that:

(a) Dr James was proceeding at a relatively slow pace in the vicinity of 10 kilometres per hour, generally on the left as she approached the s-bend;

(b) Ms Daamen was travelling at approximately six kilometres per hour;[45]

(c) Ms Daamen saw three ladies who had tri-suits on go past her who she thought were running together about the same speed as her, before she heard and then saw Mr Chaffey, who she estimated she saw approximately 60 metres from the turnaround;

(d) Dr James was not one of those women and was running on her own;

(e) Ms Daamen was at least 10 metres behind the three women, indicating that they likely were going faster than her because she stated they went past her. They were in her line of vision, but she was not focussed on them, although she made the observation that they did not look to be running competitively;

(f) Mr Chaffey came from behind Ms Daamen on his final leg travelling at significant speed and passed her around the wider orange area;

(g) it is likely that Ms Daamen was distracted by Mr Chaffey going past and turned her head away from the front;

(h) there were at least three to four athletes in proximity to Dr James as she approached the bend to leave Marine Parade to enter Mitchell Park, but it is likely that there were a couple more given Ms Groom's observations which I accept. Ms Groom saw the incident and in her text states what she saw. There were others behind Dr James and there was a line of people across the road in front of Mr Chaffey. The line of people likely included the three women seen by Ms Daamen with Dr James in front of them;

(i) although by the time of the incident the athletes in the sprint category had progressed some two kilometres and three hundred metres along the course, I consider it is still likely, due to the absence of the swim leg and the rolling staggered start, there was a greater number of athletes at that point, than would otherwise have been at that point, but not of the level that caused Dr James to consider that all could not safely progress around the s-bend, absent Mr Chaffey coming onto that part of the course at that time;

(j) it is likely as they entered the s-bend, Dr James was running in close proximity to two or three other athletes, given the observation of Ms Groom and Ms Daamen. She was not however running with them. There was a young woman further out to the right in a swimsuit;

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[45] While USM submits it is likely to have been up to 10 kilometres/hour because 6 kilometres/hour is extraordinarily slow her explanation was she had trouble with her ITB at the time and was slow. Given she was an experienced competitor, it is unlikely that she would not be conscious of her speed.

(k) Mr Chaffey was swearing and yelling for the runners to get out of the way as he was speeding up to reach the final turn and tried to steer himself through the runners ahead of him which included Dr James around the s-bend;

(l) the s-bend narrowed from the previous section of the course but was five to six metres wide up to the aluminium barrier dividing the able-bodied athletes from the bicycle riders;

(m) Dr James was travelling to the left, reasonably close but not on the race line, supported by her position when she fell. She likely moved a step to her right in response to Mr Chaffey's yelling because she was startled and not sure what the yelling was about. She was not running in the centre;

(n) Dr James had very little time to react given Mr Chaffey was travelling at least twice the speed at which she was running;

(o) Mr Chaffey did not slow down and may have sped up to get past Dr James and the other athletes in proximity to her and could not safely overtake Dr James at the speed he was travelling;

(p) as he sought to pass Dr James, he clipped or hit Dr James on her right leg, consistent with the bruising on her leg, with his rear left wheel. It is likely he was passing Dr James as close as possible to return to the race line as quickly as possible, to minimise the distance he had to travel and to avoid the girl in the swimsuit who was likely further over to the right;

(q) Dr James spun around and fell to the ground and likely hit her head while Mr Chaffey lost control, went up the barrier and fell to the ground;

(r) while Dr James was likely to have moved forward when hit, it was unlikely it was a significant distance of more than one to two metres from where she was photographed on the ground near the Chevrons,[46] because the collision caused her to spin around and land on her back;

(s) after assisting Mr Chaffey back into his chair with Ms Daamen and Ms Groom, Mr Chaffey sped off, missed the turn to the finish, and had to come back on the path thus facing Dr James and others, in order to take the turn; and

(t) Dr James also kept competing and completed the duathlon.

Evidence of Ms Van Pooss

[130] Evidence was called by USM as to the changes that had been made to the course when the competition changed from a triathlon to a duathlon.

[131] Ms Van Pooss was employed by USM as Senior Director, Operations Oceania. In her role she was responsible for the oversight of all operational planning and delivery of over 20 separate events within the Oceania region, which included the GCT. In February 2018, she was the Regional Director of Oceania. She stated she was actively involved in the determination of the layout and structure of the course of the GCT in 2017 and 2018. The 2018 course largely mirrored the 2017 course for the run leg and was substantially the same course as in 2017 for the bike leg,

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46 Exhibit 2.

save for the fact that there was no swimming leg and the run course had been altered so as to travel in the opposite direction at the beginning of the race and at the end. She had people who worked for her who were required to inspect the course prior to its commencement, including a safety inspection, which had to be carried out pursuant to the conditions of permit. Whether those inspections were carried out or not in fact was not the subject of evidence.

[132] According to Ms Van Pooss, USM had received water quality tests that indicated the levels of bacteria in the Broadwater well exceeded the standard required and as a result, a decision was made to alter the course to being a duathlon. As a result, the event was restructured such that there was an additional run leg at the commencement of the event instead of the swim leg which was 2.5 kilometres for the sprint distance event. There was a cycling leg as originally envisaged in the triathlon and a second run leg which was five kilometres for the sprint distance event. The direction of the running legs altered such that they were to proceed in the opposite direction to that originally provided for, i.e., from clockwise to anti-clockwise. Athletes completed their first run leg entry in the transition zone via the original run leg exit point and athletes commencing their second run leg exited the transition zone via the original swim exit point. That was to minimise the cross-over of runners running the second leg with those still running the first leg.

[133] There was a turn to the finish to be taken on the last leg.

[134] The method for starting the duathlon was also altered from the usual way of starting a triathlon. Rather than having athletes have a wave start which involves all athletes in a certain category starting at the same time, they implemented rolling starts to replicate the number of athletes on the course together and allow athletes to spread out naturally as they would have had the swim leg taken place. The rolling start involved two athletes commencing approximately every five seconds for the purpose of the event.

[135] In the original triathlon format, para-athletes were to start in between the enticer and sprint categories. When the event was changed to a duathlon, the starting time of the para-athletes was moved as far forward as possible in order to minimise the time the para-athletes and able-bodied athletes were on the course together. They were placed after the super kidz category event was completed. According to Ms Van Pooss, the para-athletes could not have started earlier because they could not be on the course at the same time as the elite, under 23 and super kidz categories.

[136] Ms Van Pooss said she became aware that the rolling start had been reduced such that two athletes were commencing every three seconds. She then took steps to have it changed to five seconds. In her view, having reviewed the data she did not consider that change had any significant impact on the number of athletes that would have been present on the course. Ms Van Pooss also expressed the opinion that by the time the incident occurred, which was some two kilometres into the course, there would have been a dissipation of athletes, such that they spread over the field.

[137] The events were conducted in daylight for safety reasons. The timing of the events is as follows:[47]

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[47] Van Pooss Affidavit at [66].

(a) male elite athletes and under 23 able-bodied athletes (24) – 6.15 am start and completed by 7.14 am (59 minutes);

(b) female elite athletes and under 23 able-bodied athletes (19) – 6:16 am start and completed by 7.17 am (1 hour, 1 minute);

(c) the Superkidz event (119) – 7.21 am start (rolling) and completed by 7.44 am (23 minutes in total);

(d) wheelchair athletes and visually impaired athletes (10) – wave start at 7.51 am and completed by 9.07 am (1 hour, 16 minutes);[48]

(e) remaining para-athletes in other categories to the wheelchair athletes and impaired athletes;

(f) enticer or novice (173) – 8.00 am start (rolling) and completed by 9.23 am (1 hour, 23 minutes);[49] and

(g) sprint category (1,271) – 8.13 am start (rolling) and completed by 10.52 am (2 hours, 20 minutes).[50]

[138] Dr James started at 8.33 am in the sprint category.

[139] According to Ms Van Pooss, a verbal briefing would have been given to all athletes over the PA system, every five minutes as new athletes moved into the starting area. According to her, that informed athletes as to the changes in the course, how many laps were required to be undertaken of each leg and how each category of athletes would start. There were also various officials and first-aid stations placed around the course.

[140] According to Ms Van Pooss, it is relatively common for able-bodied athletes and para-athletes to be conducting the triathlon whilst on the same course, based on her experience with over 100 triathlons and marathon events throughout Australia.

[141] Even if the 2018 duathlon had not occurred and it had been a triathlon, Ms Van Pooss stated that the para-athletes were always intended to share the course with the able-bodied athletes.

[142] Ms Van Pooss gave evidence that logistically it would be difficult to extend the time to have para-athletes doing the course on their own, given the strict time limits which were placed upon the events in order to have public roads reopened. In 2018, the final competitor completed the event at 10.51 am, nine minutes prior to the requirement to reopen a number of roads which were only closed until 11.00 am.

[143] Ms Van Pooss did not witness the incident on 25 February 2018.

[144] Ms Van Pooss confirmed that athletes would normally follow the race line which reflects the shortest distance when proceeding for instance through a curve or bend. She stated that sufficient space for another person to overtake must be left when passing through a curve or bend.

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48 T5-26/20.
49 T5-26/35.
50 T5-26/40.

[145] According to Ms Van Pooss' analysis of the race results, she estimates Dr James would have been travelling at 10.7 kilometres per hour and Mr Chaffey 20.7 kilometres per hour. That however is based on an average over the course. According to Ms Van Pooss, the wheelchairs are two and a half metres long and would generally have had an equipment check before they racked in the transition zone to ensure all equipment met the required specifications. She was not however, aware of whether that check was carried out in 2018 or not.

[146] According to Ms Van Pooss, USM does not exclude people from their events unless they had a direction from Triathlon Australia, which would normally be on the grounds of things such as anti-doping.

[147] Ms Van Pooss was involved with the GCT from 2015 to 2018. She confirmed that in 2017 there were events on the Saturday as well as the Sunday. The Saturday consisted of world triathlon series elite men and elite women as well as elite para-athletes. On the Saturday there was a separate race for the para-athletes, which was consistent with Dr James' observation. The Saturday events, however, were not managed by USM but by World Triathlon, although USM held the rights to deliver the event on behalf of the relevant body. The Sunday was the domestic competition. It included a para-triathlon category as well where there were para-athletes in wheelchairs on the circuit at the same time as able-bodied athletes was demonstrated by photographic evidence.[51]

[148] A schedule[52] was prepared by Ms Van Pooss to demonstrate that USM had operated a number of events where para-athletes had competed since 2015 and were on the course at the same time. That does not necessarily mean they were racing on the same part of the course at the same time. One example was given of the 2017 GCT where that occurred. Usually para-athletes participated with other athletes but had a separate wave start.

[149] Exhibit 47, which consisted of an information sheet as to an athlete's guide being available for the 2018 event and the athlete's guide that was available on their website was apparently notified to Dr James by an email, according to computer records of USM.[53] According to Ms Van Pooss, the email was opened. When asked, Dr James agreed that she could have opened it, but in any event said she was aware of the rules of the triathlon.

[150] Ms Van Pooss explained that the rules of USM are sanctioned by Triathlon Australia and that USM race under the Rules.

[151] USM also used the Triathlon Australia events operations manual to assist them at various planning phases to ensure that they were meeting requirements set out by Triathlon Australia.

[152] To the extent that Ms Van Pooss gave evidence of systems and operations having been met in relation to the 2018 Gold Coast triathlon, it was only from the perspective that people had reported to her that that was the case. There was no factual evidence that it had in fact been done.

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51 Exhibit 48.
52 Exhibit 46.
53 Exhibit 49.

[153] Ms Van Pooss did not think from an operational point of view that the para-athletes could be separated from the able-bodied athletes while competing at the same time through the use of some type of barrier, because it would result in a narrowing of the course for both groups as USM would need to put cones or crowd-controlled barriers up to delineate the separation.

[154] According to Ms Van Pooss, she decided the order of when the competitors were to start, when they had moved the event to being a duathlon. According to Ms Van Pooss, USM reviewed the start and how they needed to start athletes in order to reduce the risk. She stated that she changed the start from a wave start to a rolling start and rearranged the start order. She stated that she was trying to reduce the amount of time para-athletes and able-bodied athletes were on the course at the same time by starting the para-athletes first. She acknowledged that that was to minimise the risks involved, due to the two categories of athletes competing together. Her evidence in that respect was as follows:[54]

> "Yes, but why – why in that order? Why was – why were the wheelchair and visually-impaired para-triathletes sent off first, why were all other categories of para-athletes sent off second, why were the enticer athletes sent off third, and why were the sprint athletes sent off fourth? Why didn't you do it in an order, enticers first, all other categories of para-triathletes second, sprint third, and wheelchair and visually-impaired para-athletes fourth?---I was minimising the risk of - -
>
> What ri – sorry, I didn't mean to interrupt?---I was minimising the risk. So, ultimately, the aim is to reduce the amount of time para-athletes and able-bodied athletes are on course at the same time - - -
>
> Why?--- - - - so by starting the para-athletes first - - -
>
> Why?---Because there is a risk of those two sets of athletes competing together.
>
> And what would happen? What is the risk that will manifest itself in the event that that occurs?---There's a risk in all athletes competing together. But there is a risk of, you know, any different equipment that is used - - -
>
> Yeah?--- - - - may impact another athlete if athletes aren't condoning (sic) themselves correctly.
>
> Right. So you recognised, at that point, when you made the decision that these four categories would be released in that order, that there was a risk that other athletes wouldn't do the right think by their fellow athletes?---Yes, and best practice is to start para-athletes as early as you can.
>
> So that there would be a minimisation of the risk that a wheelchair para-athlete would not collide with and seriously injure a sprint athlete?---It is a way to minimise risk, yes."

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54 T 5-10/41- T5-11/24.

[155] Ms Van Pooss agreed that neither the Olympic Games, Commonwealth Games nor World Championships have able-bodied athletes competing with para-athletes. That is of little relevance to the present case without evidence being given of the race conditions involved, how they are categorised and the genesis of that separation.

[156] Ms Van Pooss agreed that when she made the decision as to the start order that there was a risk that other athletes would not do the right thing by their fellow athletes.

[157] Ms Van Pooss accepted that the risk of a wheelchair athlete colliding with an able-bodied athlete could have been obviated by ensuring that the wheelchair athletes completed their race before allowing any other category of athlete to start their competition. However, she stated that they did not adopt that option because that is not how the events operated in terms of being inclusive:[55]

> "The question is this: the risk that you have referred to – that is, the risk of a wheelchair athlete colliding with an able-bodied athlete – could have been obviated by adopting the simple expedient of ensuring that wheelchair athletes completed their competition before allowing any other category of athlete, whether it be enticer or sprint or other para-triathlete, to start their competition? Yes.
>
> Why did you not adopt that option? That is not how events are operated in terms of being inclusive. We always have our para-athletes and able-bodied athletes competing together, and that would have been the case had it remained a triathlon.
>
> Were there any other reasons? It was simply a matter of inclusion and inclusiveness; is that correct? That's current best practice, yes."

[158] Ms Van Pooss stated USM had always had their para-athletes and able-bodied athletes competing together and that would have remained the case had it been a triathlon.

[159] In the case of the Superkidz category, they were separated, and their race was completed before the commencement of others due to safety concerns. This included the risk of slower, lighter athletes being knocked to the ground and injured by the faster, heavier athletes, but was also due to the handling skills of children and immature decision-making. [56]

[160] Ms Van Pooss agreed in cross-examination that before the course was changed from being a triathlon to a duathlon and the direction was changed from being clockwise to anti-clockwise, the area where Mr Chaffey and Dr James collided would not have had to have been negotiated on their run entry, and the area to the north of the green vegetation was wider than the portion of the course where the collision between Mr Chaffey and Dr James occurred.

[161] Ms Van Pooss stated that the reasons that the course was changed from a clockwise direction to an anti-clockwise direction were that they needed an area that was large enough to corral or stage athletes that had not yet started and that if they had remained in a clockwise direction, they would have had a significant crossover

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55 T5-12/5-6.

56 Van Pooss Affidavit at [66(c)]; T5-6-T5-7.

and greater risk of collision when the athletes were either starting, re-entering their transition after their run or exiting their transition on to their second run.

[162] Ms Van Pooss considered that a soft barrier to separate part of the wheelchair athletes from the other competitors would have reduced the width for able-bodied athletes and would have increased the risk of injury, in her view, to able-bodied athletes. She considered that doing that at a 'pinch point', such as where Mr Chaffey and Dr James collided, would have created an additional hazard of confusion and would have increased the risk. She stated that using signs directing athletes to particular sides was not common in either triathlons or duathlons to instruct people where to go. She agreed that they had not however tried it.

[163] Ms Van Pooss agreed that there was no provision for instructions to be given to competitors such as "an event organiser must instruct able-bodied athletes that they should not attempt to overtake another able-bodied athlete without first looking behind them to confirm that a wheelchair athlete may hinder the overtaking move," to ensure that they will not be hindered in that manoeuvre by an approaching para-athlete. Nor is anything contained in the athletes' guide provided by USM to that effect. As mentioned above, the rules which apply are the Triathlon Australia Race Competition Rules.

[164] Ms Van Pooss was asked about the concept of changing the course, such as extending the course so there was one lap of five kilometres or trying to lengthen the time of the competition. Ms Van Pooss explained that would entail a considerable logistical exercise. USM would need additional permits as a longer course would require additional road closures or to keep the roads closed for longer. She also considered that a longer course would require setting up a lot earlier in the morning in order to close roads and install barriers and get aid stations ready. She also stated it would also have a flow on effect to volunteers, police, medical and ambulance in terms of their start times.

[165] Cyclists were separated from athletes on the run leg in the GCT and duathlon. Ms Van Pooss acknowledged that one of the reasons that bikes were separated from the able-bodied athletes was due to the risks of injury, including serious injury if able-bodied athletes and cyclists were on the course at the same time under race conditions, given bikes travel faster. In re-examination, she stated the distinction between able-bodied athletes racing with para-athletes in wheelchairs as opposed to athletes on bikes is that competitors' bike-handling skills are very different and their paces can be very different, as can be the type of bike used. She considered all of those things would create risk on a bike course which do not exist on a run leg. I did not consider her explanation identifying the differences particularly compelling. Clearly there are differences between bicycles and wheelchairs but there are also similarities to the extent that they both can travel faster than athletes on foot can run and any collision between the two would involve a solid object. I find that although the risk of injury is not as high as they would be in the case of cyclists and runners being on the same course, I do find there are similarities between the position of wheelchairs and runners to the position of cyclists and runners being on the same course at the same time.

[166] Ms Van Pooss considered it would not be operationally feasible to have a delineation between the area to be used by para-athletes as opposed to able-bodied

athletes at the point where the incident occurred, because you would be creating congestion of the able-bodied athletes of which there were a large number. For the reasons set out below given barriers had been used to separate cyclists from the runners on the course and to keep athletes separate in parts of the transition area and the width of the S bend and the fact it was at the end part of the run leg I do not accept her evidence in this regard.

[167] Ms Van Pooss addressed the email she had sent to Dr James in evidence where she had stated, *inter alia*, that the rolling start had considerable impact to the flow of athletes. She stated that it was poorly worded and that when she made the statement, that had the shortening of spacing between starts occurred the course would have much better catered for a number of athletes and the different formats they had racing, she had not looked at the "data" (which was not identified). She stated that having looked at the data, her opinion was that the course catered for the number of athletes that they had out there regardless of the fact that they had shortened the time at which athletes were commencing the rolling start than originally had been planned. Her evidence in this regard was not very convincing and appeared to cast the email in the best light to protect USM.

[168] One can accept that as the race progressed, the athletes on the course would spread out. However, the extent to which that occurred in the first leg was not further elucidated by the evidence.[57] While USM submits that the reference to the two to three second start was a reference to the congestion at the start rather than the density at the point where the accident occurred, given Ms Van Pooss was responding to Dr James' complaint knowing where the incident had occurred it would suggest, that at least at the time she wrote it, she thought it had some impact at the time of the incident. Ms Groom made comment in her text that suggesting that was her observation: "I have to say the whole change of plan when they dropped the swim meant it was crazy that we were all concentrated on the course together with the wheelies." That is consistent with Dr James' evidence saying that while in a normal triathlon people find their own speed and own position and people become less congested, that was not the case that day.[58] I accept however that while the density would have been less after two kilometres than at the start, and less than Ms Van Pooss may have thought when she wrote the email after she looked at "the data", but find the course was more congested that it would otherwise have been if it had run as a triathlon. That said, Dr James did agree that she considered that able-bodied athletes competing alone could have navigated the s-bend in the space provided.[59] As I have found above however there was a greater concentration of sprint athletes on the course at the same time as para-athletes in wheelchairs who he para-athletes in wheelchairs had to manoeuvre around than in a GCT.

[169] I found that Ms Van Pooss was generally honest but reticent in some of the evidence she gave where she thought it may damage the position of USM, her employer. There were instances where she refused to make sensible concessions, or ultimately did so begrudgingly with her attitude being more responsive in re-

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57 Cross-examination of Dr James suggested there were 229 people on the course, but no evidence of fact was given supporting that figure.

58 T1-80/34-46 – T1-81/1-11.

59 T1-79/10-20.

examination.[60] While I generally accepted the evidence but have given some aspects of her evidence lesser weight for the reasons set out above.

[170] I find that Ms Van Poos and as a consequence USM:

(a) knew that there were risks that slower athletes might be knocked over by faster heavier athletes and injured;

(b) were aware that there was a risk of injury if para-athletes in wheelchairs were on the course at the same time as able-bodied athletes and that Ms Van Pooss sought to minimise the time they were on the course at the same time to minimise that potentially occurring; and

(c) that the risk of injury to runners if hit by a cyclist was one of the reasons they are separated in triathlons.

Evidence of Mr Ray

[171] Mr Ray is employed by USM. In 2017 and 2018 he was the Technical Operations Director who worked with the Race Director and Regional Director in determining the courses used for those events. In designing the course in 2017 to use Mitchell Park, work was done at a higher level and to Commonwealth Games specifications, so it could be used later for the Commonwealth Games in 2018. He discussed the importance of the relationship with the Council, DTMR and the QPS in order to have the events proceed. He gave evidence about the necessary volunteers and infrastructure and liaison with Government necessary to enable the event to occur. He was not present at the 2018 Gold Coast triathlon. He had been in contact with the Race Director and Regional Director talking about the courses but was working overseas at the time. He had discussions with the Race Director and with Council in relation to the 2018 Gold Coast event, given the events were test runs for the Commonwealth Games, however he gave no evidence as to any specific input with respect to the duathlon course.

[172] Mr Ray's evidence was straightforward and candid while relevant to what was logistically required for a triathlon to operate. His evidence was otherwise however of little assistance, given that he was not at the course in 2018 when it was changed from being a triathlon course to a duathlon course.

[173] Based on the evidence as to the changes in the course and Ms Van Pooss' evidence, I find that:

(a) USM was aware of the risk of injury from a para-athlete colliding with an able-bodied athlete when they were on the course at the same time;

(b) that USM took steps to reduce that risk by seeking to start para-athletes earlier so as to minimise the time they were on the course at the same time;

(c) USM did not provide for para-athletes to compete separately from the able-bodied athletes due to their events operating on a principle of inclusiveness;

(d) no specific instructions were given in relation to steps that were to be taken by either the para-athletes or able-bodied athletes to minimise the risk of collision between them while competing on the course;

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60 T5-11/30-45.

(e) USM did separate other categories of competitors such as the children for safety and other reasons. Cyclists were separated from the runners in triathlons operated by USM, due to safety concerns if a collision occurred between an able-bodied athlete and a cyclist as well as different racing conditions;

(f) while a barrier at the s-bend after the orange concrete would have narrowed the area for the able-bodied athletes and para-athletes, I was not persuaded the funnelling of the athletes would not have left sufficient room for each to safely traverse the s-bend; and

(g) that USM knew the practice of athletes at least who were competitive, was to adopt the shortest approach in the last leg to reach the finishing line, which would have included Mr Chaffey.

Duty of care and breach of duty

Duty of care

[174] Dr James alleges that given USM's responsibility for all aspects of the GCT and the changes that had occurred in the triathlon course when it was made a duathlon, USM was aware or ought to have been aware of the risk of injury to able-bodied participants by simultaneously conducting events on the same course for para-athletes in wheelchairs and able-bodied participants.[61] Dr James contends that USM owed a duty of care to safeguard participants in the GCT from foreseeable risks of danger or injury whilst those persons were on the course and participating in the GCT.[62]

[175] USM does not dispute that that they owed a duty of care to take reasonable steps to minimise the risk of injury to competitors and that Dr James came within the relevant class to whom the duty was owed. USM therefore admits that as the organiser of the GCT, it owed a duty to take reasonable care for the safety of Dr James as a participant in the GCT, and that the duty was to take reasonable care to minimise the foreseeable risks of injury to Dr James whilst she was participating in the GCT.[63]

[176] Despite the fact there were only eight para-athletes on the course, who would have been dispersed at various parts of the course, USM concedes that it is arguable that it is foreseeable, even if highly improbable, that a para-athlete in a wheelchair may collide with an able-bodied athlete in the course of the conduct of the run leg of the race. However, USM denies that there is any breach within the terms of that duty, having regard to ss 9 and 10 of the CLA.

[177] Dr James unhelpfully only addressed in her submissions the position at common law in relation to the question of the duty of care and breach of duty, because she relied primarily in final submissions upon s 60 of the *Competition and Consumer Act* (2010) (Cth) ("**CCA"**) of the *Australian Consumer Law* ("**ACL"**) as establishing her cause of action, to which the common law principles as to breach of duty are relevant. While USM submitted that Dr James should be unsuccessful if

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61 Further Amended Statement of Claim ("**FASOC**") at [3]-[6].
62 FASOC at [7].
63 Further Amended Defence ("**FAD"**) at [6].

her case was not determined on the basis of the common law, I consider Dr James had pleaded her case on both bases and not abandoned a case where the CLA applied. As a result, I have considered the cause of negligence in accordance with the CLA and by reference to traditional common law principles.

Risk of harm

[178] It is necessary to correctly identify the risk so one can assess whether it is foreseeable, and if so, what a reasonable response to that risk would be, either at common law[64] or under the provisions of the CLA.[65]

[179] In identifying the risk of harm, as opposed to the question of breach, which is prospective, the court may have regard to what actually happened.

[180] In *Dederer*, Gummow J stated that the relevant identification of the relevant risk is concerned with determining the source of the potential injury.[66]

[181] The risk is not to be confined to the precise set of circumstances which are alleged to have occurred, although it must encompass those circumstances.[67] The level of particularity in defining the risk of harm is often not an easy process and may be necessary in order to determine what reasonable precautions ought to have been taken in order to avoid the risk.[68] That said, the risk of harm must be that which materialised in the case of the injured person seeking to claim in negligence.[69]

[182] In her final submissions, Dr James framed the risk of injury in narrow terms, namely, "the interaction of Chaffey…as an elite triathlete with the capacity to travel out up to 35 kph". [70] However in oral submissions in relation to the breach of a duty of care the plaintiff's counsel defined the risk to be "the risk of somebody in the position of the plaintiff suffering serious harm or even death as a consequence of a collision between a para-athlete in a wheelchair and an able-bodied athlete attributable to the fact that those parties are on the course concurrently."[71]

[183] USM contends that there is no case pleaded that there ought to have been some specific consideration for a competitor in the position of Mr Chaffey or otherwise in respect of those who are elite competitors, and that if Dr James was to cast her case so narrowly, she was obliged to plead it both at common law as outlined in *Dederer* and under s 9 of the CLA.[72]

[184] USM therefore objects to the way Dr James now seeks to characterise the risk. It also complains that no evidence led from Dr Grigg in that regard.

[185] There was no necessity for expert evidence to be led in relation to the risk, however the expert opinion may assist in the identification of harm and serve to put the defendant on notice of the case it has to meet.

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64 *Roads v Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 ("***Dederer***") at [59].
65 *Menz v Wagga Wagga Show Society Ltd* [2020] NSWCA 65 at [50]
66 *Dederer* at [60].
67 *Uniting Church in Australia Property Trust (NSW) v Miller* (2015) 91 NSWLR 752 at [118].
68 *Perisher Blue v Nair Smith* (2015) 90 NSWLR 1 at [101]-[106].
69 Garzo v Liverpool Campbelltown Christian School [2012] NSWCA 151
70 Plaintiff's submissions at [14]-[15].
71 T1-67/27-30
72 *Uniting Church in Australia Property Trust (NSW) v Miller* (2015) 91 NSWLR 752.

[186] It was evident that Dr James' case evolved and narrowed throughout the trial.

[187] The scope of the duty of care was a broad allegation where the risks were not in fact defined, namely:[73]

> "The defendant was aware, or ought to have been aware of, the risk of injury to able-bodied participants by simultaneously conducting events, on the same course for para-triathletes in wheelchairs and able bodied participants.
>
> The defendant owed a duty of care to take reasonable care to safeguard participants in the GCT from foreseeable risks of danger or injury whilst those persons were on the course and participating in the GCT."

[188] The description of risk is very broad. There is no formula to be adopted in framing the relevant risk,[74] but the way that the risk is framed in submissions focusses very closely on the circumstances of the case in which the incident is alleged to have occurred.

[189] It is further pleaded that the risk was foreseeable, not insignificant and a risk which in the circumstances a reasonable person in the position of USM would have taken steps against. None of the allegations are particularised. They should have been in accordance with the UCPR. However, USM should have sought to confine the pleading through requesting particulars.

[190] USM raised allegations about Mr Chaffey in a different way in its FAD, alleging that the "incident was caused as a conduct of Dr James and/or Mr Chaffey, as particularised in paragraph 7 and 8 herein."[75] Those paragraphs include allegations including that Mr Chaffey would have had a clear view of Dr James and should have recognised the position of Dr James and reduced his speed or otherwise positioned his wheelchair so he could safely pass Dr James.[76]

[191] Specific reference was made to Mr Chaffey's conduct in the ASOC in the context of the alleged breaches of duty of care[77] and in the Amended Reply ("**AR**"), including that the conduct of USM in allowing Chaffey to come behind runners at speed as alleged in the FASOC was causative of the incident, and that the risk of collision if the athlete or para-athlete failed to keep a proper lookout were the very actions alleged against Mr Chaffey that USM should have guarded against and did not.[78]

[192] Mr Chaffey's conduct was a significant issue in play throughout the proceeding. For example, both parties led significant evidence from Ms Daamen as to the conduct of Mr Chaffey on the course. Further, Dr James' counsel led evidence from Dr James as to the conversation with Ms Van Pooss which she relies upon in the context of USM's knowledge of the risk of Mr Chaffey "going hard." Dr James was not challenged that the conversation had occurred. Evidence was led from Ms Van Poos

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73 [7] ASOC.
74 *Menz v Wagga Wagga Show Society Inc* [2020] NSWCA 65.
75 FAD at [3(m)(v)].
76 [7(w)] and [7 (x)].
77 [9(l) (m)] and [9(l) (n)].
78 See for example, AR at [20], [21(d)], [27].

in chief to counter act the suggestion she had laughed when she spoke about Mr Chaffey to Dr James. She did not deny the conversation occurred, but she could not recall aspects of the conversation.[79]

[193] While Dr James did not plead the risk of harm with any specificity in the FASOC, the AR did raise further contentions relevant to risk in relation to the narrowing of the course at the s-bend where the incident occurred, the speed which the wheelchairs were capable of travelling as well as the failure by a para-athlete to keep by a proper lookout.

[194] As to the reference to Mr Chaffey as an elite para-athlete, that was a relatively uncontentious fact in the way the trial was conducted. He was referred to in that way in Ms Van Pooss' affidavit.[80] Ms Daamen gave evidence that she had met him when he was representing Australia overseas and that on the day of the incident, he was vying for selection in the Commonwealth Games and World Championship and that he had podiumed before.

[195] I do not consider that Dr James is prevented from raising the risk as narrowly as she has given the way the case was conducted. However, whether that is the correct identification of the risk of harm is a different question.

[196] USM also objected to Dr James seeking to narrow the risk of harm to the "pinch points" or "pressure points" rather than a generalised risk as a consequence of simultaneously conducting the events. That however was a case which is open to Dr James given the questioning of Ms Pooss about barriers being placed at the pinch points or where the athletes would bunch up, such as the s-bend where the accident occurred.[81]

[197] In *Menz v Wagga Wagga Show Society Inc*,[82] Leeming J rhetorically stated how the risk of harm was to be identified when it was not identified at all in the pleadings. In that regard, he referred to the judgment of Payne AJA and himself in *Coles Supermarkets Australia Pty Ltd v Bridge*[83] at [22], where they stated:

> "(1) the formulation of risk of harm should identify the "true source of potential injury" (*Roads and Traffic Authority of NSW v Dederer* at [60]) and the "general causal mechanism of the injury sustained" (*Perisher Blue Pty Ltd v Nair-Smith* (2015) 90 NSWLR 1; [2015] NSWCA 90 at [98]);
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> (2) "the risk must be defined taking into account the particular harm that materialised, and the circumstances in which that harm occurred": *Erickson v Bagley* [2015] VSCA 220 at [33]; *Southern Colour (Vic) Pty Ltd v Parr* [2017] VSCA 310 at [55];
>
> (3) "What is to be avoided is an unduly narrow formulation of risk of harm which then distorts the reasoning, because, for example, it obscures the true source of potential injury (as noted in *Dederer* at

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79 Plaintiff's counsel was quick to raise objection when the defendant's counsel was asking about the conversation which caused the defendant's counsel to change the questioning.

80 At [90].

81 See also [44] of the AR.

82 [2020] NSWCA 65.

83 [2018] NSWCA 183.

> [60]) or because it too narrowly focusses on the particular hazard which caused the injury (as noted in *Port Macquarie Hastings Council v Mooney* ... at [67]), or because it fails to capture part of the plaintiff's case (as in *Garzo*)."

[198] The court in *Perisher Blue Pty Ltd v Nair-Smith*[84] framed the question in this way:[85] *"In essence, the enquiry is concerned with determining what person, thing or set of circumstances gave rise to the potential for the harm for which the plaintiff seeks damages."*

[199] As is apparent from *Menz,* the failure to properly identify the risk of harm in the pleading is not necessarily fatal.

[200] Notwithstanding that in the present case, Dr James' injuries arose from Mr Chaffey's wheelchair colliding with her right leg and the force causing her to fall, defining the risk as Dr James proposes to the risk of being hit by Mr Chaffey, an elite athlete who could travel up to 35 kilometres per hour is too narrow insofar as it seeks to identify the risk by reference to the particular circumstances of the case.

[201] USM appear to formulate the question in much broader terms stating that the issue is that given the risk of a collision between an able-bodied athlete and a para-athlete in a wheelchair at some undefined point on the course, which is not in proximity to the start, what is the appropriate response by the defendant.[86]

[202] To characterise the risk in that way would be too broad and fail to account for the fact that speed was a factor. Nor is it simply the risk of injury from the able-bodied athlete and para-athlete in a wheelchair being on the same course at the same time, as opposed to being on the same part of the course at the same time albeit at different stages of the race. The area of the course where the collision occurred is also part of the relevant circumstance for the injury occurring given it was a narrower area where the para-athlete in a wheelchair and Dr James collided.

[203] Given the different nature of a wheelchair as opposed to athletes not racing on a solid bike and the capability of the wheelchair to reach speeds other athletes cannot, the risk of harm is appropriately identified as the risk of injury as a result of contact between an able-bodied athlete in the position of Dr James and a para-athlete on a wheelchair capable of travelling up to 35 kilometres per hour being at the same part of the course where the course narrowed concurrently.

[204] I consider the risk of harm was raised sufficiently by the conduct of Dr James' case as well as the matters raised in the AR by Dr James.

Was the risk foreseeable?

[205] In determining whether there has been a breach at common law, the long-established test laid down by Mason J in *Wyong Shire Council v Shirt*[87] *("**Shirt**")* is applied, where his Honour stated:

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84 (2015) 90 NSWLR 1.
85 At [98].
86 Defendant's submissions at [105].
87 (1980) 146 CLR 40 at 47.

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

[206] A risk of injury is foreseeable if is a risk that is not one that if far-fetched or fanciful.[88] The question of foreseeability must be considered prospectively not retrospectively.

[207] The test laid down by Mason J in *Shirt* has been modified to some extent by the introduction of the statutory regime in ss 9 and 10 of the CLA. Those provisions provide:

> "**9 General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;
>
> (d) the social utility of the activity that creates the risk of harm.
>
> **10 Other principles**
>
> In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—

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88 *Shirt* at 47-48

> (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
>
> (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
>
> (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk."

[208] The statutory formulation has been acknowledged as bringing about a slight increase in the degree of probability of harm which is required for a finding that the risk is foreseeable.[89] In the context of breach of duty I have discussed the matter by reference to both common law principles and the CLA as a result of the plaintiff relying on s 60 of the ACL which applies the common law principles applied in determining whether there has been a breach of duty in considering whether services have been rendered with due care and skill.

[209] USM quite properly concedes that the risk of injury to Dr James from a collision with a para-athlete in a wheelchair was foreseeable in the sense of not 'far-fetched or fanciful". It further accepted that case in respect of the assessment of risk of an incident giving rise to potential injury occurring that entities, such as USM, must anticipate that some competitors will engage in conduct which is unexpected, inadvertent or not conventional.

[210] At the time of the incident one para-athlete in a wheelchair had finished. Mr Chaffey was the second fastest para-athlete on the final run leg. As submitted by USM it is probable that other para-athletes in wheelchairs were either on the cycle leg or the final run leg. It accepts that it is thus arguable that it is 'foreseeable' (even if highly improbable) that a disabled competitor in a racing wheelchair, for several reasons, may collide with an able-bodied athlete in the course of the conduct of a 'run leg' of the race.

[211] Under the CLA the risk must not only be reasonably foreseeable but not insignificant. I am satisfied that this is satisfied.

[212] Given a para-athlete in a wheelchair is able to reach speeds up to double that of an able-bodied athlete, there was, even though the para-athletes in wheelchairs were to start earlier than the sprint athletes, a real risk that some of the para-athletes, such as Mr Chaffey, would reach the final run leg of the course and share the same course with athletes of varying ages and athletic abilities on their first leg, some of whom would be running at a slow pace, like Ms Daamen. As there had been the rolling starts that day which had been shortened to 2-3 seconds for some period rather than 5 seconds, USM knew or ought to have known that there was likely to be more

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[89] *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd* [2013] 1 Qd R 319 at [26] per Fraser JA (White JA and Mullins JA agreeing); *PWJ1 v The State of New South Wales* [2020] NSWSC 1235 at [81].

athletes on the first run leg who were more concentrated than they otherwise would have been even after there had been some dispersing by the two kilometre and three hundred metre mark of the run course.

[213] USM knew or ought reasonably to have known all of these matters given it had changed the course to the duathlon and was aware of the risks from para-athletes in wheelchairs colliding with able-bodied athletes. Ms Van Pooss also acknowledged that para-athletes were started earlier than able-bodied athletes to minimise the time the two were on the course at the same time due to the risk of collision and injury as athletes would not always follow the rules.[90] USM was aware of the speed that para-athletes in wheelchairs could reach. They were at least aware of Mr Chaffey as a hard competitor who competed at the elite level and travelled fast. USM knew para-athletes could gain points from the competition and were competing for rankings. Consistent with its experience with all athletes who were competitive and seeking to achieve their best result such as Mr Chaffey, USM would have been aware that athletes would seek to hug the race line, including at the s-bend, and seek to overtake athletes in front of them. They further knew or ought to have known that athletes were likely to be more bunched up at narrower parts of the course such as the S Bend which would increase the risk of contact between para-athletes in wheelchairs and able-bodied athletes.

[214] A reasonable person in the position of USM, knowing of the matters identified above and given the knowledge of USM, would have considered that the risk of harm was reasonably foreseeable and not insignificant, looking at the matter prospectively.[91]

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90 T5-10; T5-11.

91 *PWJ1 v The State of New South Wales* [2020] NSWSC 1235 at [76] and [80]-[81].

Should USM have taken steps against the foreseeable risk?

[215] In considering whether there is a breach of a duty of care it must be borne in mind that the common law recognises "a duty to take reasonable care to avoid doing what might cause injury to another, not a duty to act to prevent injury being done to another by that other, by a third person, or by circumstances for which nobody is responsible."[92]

[216] The question of whether reasonable care was exercised "is to be adjudged prospectively, and not by retrospectively asking whether the defendant's actions could have prevented the plaintiff's injury".[93] Hayne J framed the matter in this way; "the inquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered."[94] One possible response is nothing.

[217] The statement that a risk is foreseeable does not suggest anything about the probability or improbability of its occurrence.[95] Once it is determined the risk is foreseeable, the perception of the reasonable man's response calls for a consideration of the magnitude of the risk.[96] In assessing a reasonable person's response, the magnitude of the risk and the degree of probability of its occurrence must be considered, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant, in this case USM, may have had.[97]

[218] Pursuant to s 9(1)(c) of the CLA requires the plaintiff to establish that in the circumstances, a reasonable person in the position of USM would have taken the precaution of holding separate events for the para-athletes in wheelchairs or erected hard or soft barriers or some other painted delineation of where athletes and para-athletes in wheelchairs were to go on a pathway, with some instruction to athletes and para-athletes in wheelchairs that they were to go on a particular side of the delineation.

[219] Whether a reasonable person in the position of USM would have taken such steps the Court is to take into account of the matters identified in s 9(2) of the CLA.

[220] That assessment of whether and what reasonable precautions would be taken by a reasonable man must be made by reference to all of the circumstances. That includes the fact that there were rules in place governing the triathlon, the logistical exercise to set up a triathlon and the inherent risks that are accepted by all athletes in entering a triathlon as well as the inclusive nature of the triathlons operated by USM and the circumstances surrounding the incident in question.

[221] Dr James pleaded a number of allegations in respect of which USM is said to have breached its duty of care.[98] However, the principal allegations relied upon by Dr

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92 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 478 per Brennan J, referred to by Gummow J in *Dederer* at [51].
93 *Dederer* at [65].
94 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [126].
95 *Felhaber v Rockhampton City Council* [2011] QSC 023 at [27].
96 *Vairy v Wyong Shire Council* (2005) 223 CLR 422.
97 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 109.
98 FASOC at [9].

James in final submissions as to breach of duty were more confined. Dr James contends that USM failed to respond to the risk of injury in:[99]

(a) failing to warn Dr James and other participants of the risk of injury of being struck by a para-athlete in a wheelchair;

(b) failing to have a hard or soft barrier (cones) in place to separate able-bodied athletes and para-athletes in wheelchairs;

(c) failing to have some delineation on the course such as a painted line, consistent with exhibit 52 identifying where the runner should go and where the wheelchair athlete should go;

(d) failing to administer a specific direction to able-bodied athletes that they were to follow the visual signage and occupy that part of the course to the left delineated by the visual pictorial of a runner; and

(e) failing to administer a specific direction to the wheelchair athletes that they were to occupy the course to the right at a 'pinch point' and adhere to the visual pictorial for a para-athlete.

[222] There is no dispute that there were no barriers or other separation devices positioned on the course specifically for the purpose of separating para-athletes in wheelchairs from other able-bodied athletes.

[223] Dr James particularly relies on the fact that the course provided for barriers separating cyclists from runners, through the use of hard barriers, to meet the risk of cyclists interacting with runners and avoid a potential collision. Dr James contends that the wheelchairs were a machine which could go must faster than other runners. That is again not a matter which is controversial between the parties. Dr James contends the risk is no different where para-athletes with wheelchairs are on the course with runners as it would be if cyclists were on the course with runners, but USM failed to have a similar response. I have accepted that there are similarities but the risk is not as high given the number of para-athletes with wheelchairs competing and that cyclists can reach higher speeds. Insofar as USM contends by its pleading and by inference from the evidence of Ms Van Poos, that the risk of injury was met by a visual assessment by USM of the course and its layout, Dr James' counsel point to the absence of evidence of the nature of that assessment and how it would have minimised the risk. While USM had sought to rely on the fact no irregularities or concerns as to safety were reported to Ms Van Poos who was aware that such inspections were carried out, the evidence did not establish that there was any visual assessment carried out as the safety of the course and consideration given to whether or not barriers were required.

[224] In oral submissions counsel for Dr James maintained that the exercise of reasonable care required USM to run the para-athletes competition separately from the able-bodied athletes altogether, against the background of Mr Chaffey's over-competitive streak which USM was aware of through Ms Van Poos from previous competitions.

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99 Plaintiff's submissions at [50].

[225] USM in response to the risk of harm:

(a) Provided for para-athletes in wheelchairs to start earlier and for athletes in the enticer and the sprint categories to have staggered rolling starts;

(b) Relied on the rules and protocols in place which if abided by Mr Chaffey and Dr James, it contends would have prevented the incident occurring.

[226] The Rules, which it is uncontentious applied to the duathlon, provided expressly that athletes be responsible for their own safety and the safety of others.[100] Dr James acknowledged that she was aware of the rules that applied. Such rules also applied to Mr Chaffey.

[227] Rules which govern participation in sport are not necessarily conclusive of the content of the duty of care owed but are factors to be taken into account in assessing what was required by the standard of reasonableness.[101]

[228] USM emphasises that there was minimal or no risk from a collision between an able-bodied athlete and para-athlete if they simultaneously conducted events on the same courses, if the able-bodied athletes and para-athletes were conducting themselves in accordance with the rules of the triathlon and were having regard to the safety of others. According to USM, the only prospect of a collision occurring was if the athletes and/or para-athletes did not keep a proper lookout or otherwise acted negligently, carelessly and/or recklessly.[102]

[229] USM accepts however, that entities such as itself must anticipate that some competitors will engage in conduct which is unexpected, inadvertent or not conventional but not reckless conduct which it contends was engaged in by Mr Chaffey, which it contends was a matter beyond its control.

[230] USM's submissions referred to Mr Chaffey being an elite para-athlete, as did the AD, so there was a reasonable assumption he was travelling at significant speed.[103] USM alleges that Mr Chaffey was travelling between 25 to 35 kilometres per hour. While Dr James' case is directed to different matters than USM's, both sides focussed on Mr Chaffey. As such, the narrowing of Dr James' case was within the parameters of the case. The state of knowledge about Mr Chaffey as a competitor is relevant to the assessment of the risks that ought to have been known by USM.

[231] The rules provided for an athlete to take care of their own safety and there was a protocol that athletes keep left unless overtaking, which I accept was generally followed by athletes, as accepted by both Dr James herself and Ms Daamen. The fact that Dr James may have conducted herself in a way which constituted a failure by her to take reasonable care for her own safety, insofar as it is contended that she

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100 Van Pooss Affidavit, Exhibit 1; Rules, Rule 1.1.

101 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [28], per Gleeson CJ (with whom Hayne J agreed); *Rootes v Shelton* (1967) 116 CLR 383 at 389, per Kitto J.

102 FASOC at [6].

103 Defendant's submissions at [10]; FAD at [7(r) (ii) and (iii)]; AR at [63] "by reason of [10] of the Further Amended Statement of Claim and [2]-[8] of the Further Amended Defence the risk of harm was foreseeable, significant and a reasonable person would have taken the actions specified which would have prevent the incident occurring".

did not keep to the left of the course, would not necessarily preclude the risk of injury being foreseeable[104].

[232] By engaging in sport, it is relevant to bear in mind, as was said by Barwick CJ in *Rootes v Shelton*,[105] that "the participants may be held to have accepted risks which are inherent in that sport … the tribunal of fact can make its own assessment of what the accepted risks are".

[233] Dr James acknowledged that there was a risk of athletes tripping over or knocking into each other in triathlons, which can lead to a serious injury, as was the case in relation to the swim leg. Ms Daamen also made the same point that this was part of the risk of competing. The present evidence is however insufficient to conclude that the risk of being knocked over or clipped by a wheelchair travelling at speed however is an "inherent risk" of a triathlon. While there was some evidence that para-athletes in wheelchairs and able-bodied athletes had been on the course at the same time, the evidence of the extent of overlap between the two categories of athletes was limited.This is further discussed in the context of defences.

[234] As USM submitted, the mere fact that Mr Chaffey may have acted in breach of the rules in relation to the incident does not lead to a conclusion that USM has failed to take reasonable care.[106] Mr Chaffey was bound by the same rules as all other athletes including the rule to take care and was not free to act recklessly. It was submitted on behalf of Dr James that in the present case, the rules and protocols in place were not sufficient to meet the risk and further precautions were required to meet the risk.

[235] USM knew, as was the fact, that the course included:

(a) para-athletes in wheelchairs included para-athletes such as Mr Chaffey who would go hard and very fast when he raced and was seeking to achieve a competitive time and prepared to push himself to the extent of going out of his chair.

(b) that there was likely to be a greater number of athletes on the run leg than might be normally experienced in a triathlon due to the run leg being the first leg with a staggered start;

(c) that the s-bend was narrower than the other parts of the course; and

(d) that there were athletes of varying abilities participating in the event, including those who were slow runners.

[236] Although a different factual context from the present, Dr James relies, in particular, on *Trevali Pty Ltd (trading as Campbelltown Roller Rink) v Haddad ("**Haddad**")*:[107]

> "When a defendant creates a situation of danger, it may or may not owe a duty of care to those who choose to enter into it. ... Where a

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104 *Anderson v Mount Isa Basketball Association Incorporated* [1997] QCA 340 ("**Anderson**") at 6-8 per Davies JA and Denmack J, McKenzie J dissenting.

105 (1967) 116 CLR 383 at 385.

106 *Rootes v Shelton* {1968) 116 CLR 383 at 385

107 (1989) Aust Torts Reports 80-286 at 69,032 (col. 1), per Mahoney JA, with whom Priestley JA agreed.

> person brings together a crowd of people and organises their participation in activities in which injury is apt to occur, he will ordinarily owe to those people a duty in respect of the dangers which have been created. There are some activities in which there are dangers which are necessarily involved in what is done and which, if the activity is to be carried on, cannot be removed or reduced. If it be accepted that the defendant may carry on such an activity then the proper view may be that there is no duty of care to those who engage in it in respect of such dangers. But in this case, there was a relevant duty of care. The situation which the defendant had set up, viz, the aggregation of a large number of people together roller skating in a confined area, was one in which injury was apt to occur because (I take the aspect relevant to the present case) some skater was likely to push another skater."

[237] In consideration of when a person is required to take reasonable care to avoid a risk of harm to another breach of duty, weight is to be given to an expectation that potential plaintiffs will exercise general care for their own safety as a matter of factual judgment. The weight given may depend on the circumstances of the case.[108] Although said in a different context, Gummow J in *Dederer*, in the context of a duty of care owed by the defendant in relation to a bridge stated, "the RTA's duty of care was owed to all users of the bridge, whether or not they took ordinary care for their own safety … the RTA did not owe a more stringent obligation towards careless road users as compared with careful ones. In each case, the same obligation of reasonable care was owed, and the extent of that obligation was to be measured against a duty whose scope took into account the exercise of reasonable care by road users themselves."[109] At common law, the expectation that a person will take care for their own safety and matters such as the obviousness of the risk are not necessarily conclusive of liability.[110]

[238] In the present case there was a specific rule in the Rules that athletes must be responsible for their own safety. However, given the speed with which a para-athlete in a wheelchair can travel, in the context of the facts of the present case that rule provided little protection.

Expert evidence

[239] Dr James called evidence from Dr Grigg. He was an honest witness. Dr Grigg is an engineer but had no experience in relation to the conduct of triathlons, nor had he analysed the details of how they operated. He did however visit the site where the incident occurred. He had focussed on the result of the starting arrangements which resulted in an overlap between the able-bodied athletes and para-athletes in wheelchairs. His evidence was therefore of limited assistance in terms of the design of the course, the operation of the triathlon event and logistics involved. However, his evidence of speed and momentum and the potential effect of any collision

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108 *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234 at [35] per Gleeson CJ, McHugh, Kirby, Hayne and Heydon JJ; *Anderson v Mount Isa Basketball Association Incorporated* (1997) QCA 340

109 *Dederer* at [47].

110 *Thompson v Woolworths (Queensland) Pty Ltd* at [37]; c.f. CLA ss 14 and 15; see also *Anderson* at 10.

between a solid object such as a wheelchair and an able-bodied athlete and the risks posed was of some relevance which I have given some weight to, but overall, I did not find his evidence of great assistance in determining the outcome to the present case.

[240] Dr Grigg opined that the course design was unsuitable for use by both types of athletes at the same time as a result of the:

(a) narrowing of the course on the approach to the corner;

(b) sharpness of the corner;

(c) large difference in the speeds of the wheelchairs and the runners;

(d) lack of signage and a track marshal to draw attention to the nature of the corner and give directions; and

(e) need for the wheelchair to slow down to negotiate the corner.

[241] Dr Grigg's criticisms of the design of the triathlon course were not pursued in final submissions. Given his lack of expertise in triathlons and his lack of investigation into the design of triathlon courses, I considered his opinions in that regard of little weight. In any event, as Dr James' case developed this was not a matter which they sought to develop in closing submissions.

[242] Dr Grigg's proposed response to the perceived risk was:

(a) to provide for a separate pathway for para-athletes; and

(b) to start the race in a way that para-athletes are not on the course at the same time as able-bodied athletes.

[243] Dr Grigg indicated that if it was not possible to have the events conducted so that the able-bodied athletes and the para-athletes were separated, instruction should have been given to the able-bodied athletes indicating that they should keep left and leave a lane width of at least two metres on the right-hand side for wheelchair athletes. Alternatively, Dr Grigg opined that able-bodied athletes and para-athletes could have been separated into different lanes, as had been done with cyclists:

> "…the problem was – or is – that you're mixing wheelchairs with runners and that is what happened, and you're no – you're – you seem to have focused, in the questions you've asked me, you seem to have focused on the wheelchair athlete travelling at high speed and being not recog – well, not taking appropriate care when it's also quite possible that the runners were not keeping strictly to the left but even the – but they couldn't – that may have been for good reason and there could have been a – a lack of knowledge or awareness that there was a wheelchair coming through that at the time when the wheelchair rider made his observations and tried to steer apart, the situation changed at the very last moment because a runner would step into what had been thought was a safe path for the wheelchair. Now, the – the only way I can see us avoiding that type of situation is for the wheelchairs and the runners to not be on the same path."

[244] His opinion in this regard is of some relevance but I don't place significant weight upon it given it is a matter which does not a matter which requires expert opinion.

[245] I do accept Dr Grigg's evidence that:

(a) Dr James would not have necessarily moved more than a metre forward when hit or clipped by Mr Chaffey's wheelchair;

(b) it was likely that Mr Chaffey's back wheel came into contact with Mr Chaffey given his rear left-hand wheel was flung up in the air;

(c) that while there is a risk of runners clipping each other when they overtake, cyclists colliding or someone hitting another while swimming, there is a point of difference with a para-athlete because of the additional machinery in terms of the wheelchair;

(d) that there was no object impeding visibility at the 's-bend', but visibility will depend on how other athletes are placed in front of a person;

(e) that while it was reasonable to expect athletes to keep a look out, the course creates a situation where you have a vehicle moving at a relatively high speed than the runners who will be running at a lower speed and care would be required from the wheelchair operator;

(f) there are factors other than keeping a lookout for others and slowing down which may lead to contact occurring such as the runner moving into the path of the wheelchair operator which cannot be avoided;

(g) the risk of being knocked over by a wheelchair is bigger because of the differential speed and has some similarities to being knocked over by a cyclist; and

(h) one way of addressing the risk is to provide barriers separating the able-bodied athletes from the runners as was done for cyclists and another is to have wheelchair athletes start and finish before other athletes.

[246] While Dr Grigg's evidence gives some weight to the plaintiff's case, I did not find his evidence of great assistance in the resolution of this case.

Magnitude of risk

[247] Given the risk of harm is not merely a collision between competitors, but a collision between a para-athlete in a wheelchair capable of travelling at speed, which is a solid object and relatively low to the ground, and an able-bodied athlete, the degree of harm suffered from a collision is likely to involve a fall and therefore there is a significant risk it may result in serious injury, such as broken bones or a head injury. The magnitude of risk is potentially serious.

Probability of harm

[248] USM contends that given there were only eight para-athletes in wheelchairs on the course and that they started at an earlier time than the able-bodied athletes, there was a very low probability, almost non-existent prospect, of a collision occurring if the athletes had adhered to the rules and protocols of the triathlon. Dr James

contends USM's assessment is untenable but provides little analysis to lead to that conclusion.

[249] As to the probability of such a collision occurring, there was no evidence before me as to the frequency or otherwise of collisions occurring between able-bodied athletes and para-athletes in wheelchairs occurring.

[250] I do not consider that the risk of collision could have been regarded as very low to non-existent given the following:

(a) Ms Van Pooss acknowledged that there was a risk of collision between para-athletes in wheelchairs and able-bodied athletes and stated that USM sought to minimise their time on the course together as a result;

(b) the environment was a competitive environment where the athletes are racing against each other and some para-athletes, or at least Mr Chaffey, were seeking to gain points as an entry to the Commonwealth Games;

(c) while there were protocols which athletes abided by and rules in relation to both personal safety and the safety of others in place, the protocols appeared to have developed over time by those competing and the rules were non-specific to any particular situation and general in their terms.[111] While there is provision in the Rules for sanction where there

(d) there were parts of the course which narrowed, such as the area of the s-bend, where there is a narrowing of the course where it could be reasonably expected athletes would be likely to bunch up;

(e) the s-bend of the course was some 100 metres from the turn to the finishing line and athletes approaching the finishing line would be more likely to overtake and hug the race line to finish in their best time;

(f) even if athletes were abiding by the protocols and rules, given the competitive environment, there was a significant risk that misjudgements would occur when athletes seek to overtake another competitor, resulting in them not leaving enough space or stepping out as another sought to pass and of some athletes pushing the limits of the rules or not complying with them to achieve a better time or as a result of ignorance or inadvertence; and

(g) there was, as a result of the run leg being the first and last leg, likely to be more athletes in proximity to each other in the first leg albeit that USM staggered the start between athletes to reduce that although shorter than intended for some period of time, the athletes spread out over the course as it progressed.

[251] Given the number of people of varying abilities who were racing in a competitive environment, the fact that athletes were undertaking the run leg on the first leg and the third leg, and the small number of para-athletes participating, and that the rules and protocols could not be relied upon to prevent any collision in a competitive environment, I consider the probability is reasonably low, but not non-existent or highly improbable.

Reasonable precautions in response to the risk of harm

111 T 4-88 and T4-89.

[252] As set out above, Dr James' case significantly narrowed in relation to reasonable steps that should have been taken to avoid the risk of harm, namely:

(a) whether there was a breach of duty by failing to delineate separate parts of the course to separate the able-bodied athletes from the participants. Dr James' submissions appear to narrow that now from the entire course to "pinch points" such as the s-bend curve where the incident took place; [112] and

(b) whether, given USM's knowledge of the conduct of competitors such as Mr Chaffey, reasonable steps should have been taken so the para-athletes and runners were not on the same course at the same time.

[253] Dr James' case was that the para-athletes in wheelchairs and able-bodied athletes could be separated relatively easily in the 'pinch points' such as the s-bend by some form of barrier or marking. In particular, Dr James submitted that was done for the cyclists and should have been done relatively easily to separate para-athletes from able-bodied athletes.

[254] As to erecting barriers between the para-athletes in wheelchairs and the able-bodied athletes, it would not appear to have been difficult or cause significant expense or inconvenience to erect barriers or put witches' hats to divide the athletes because USM had relevant experience in the use of barriers and:

(a) used aluminium barriers to separate cyclists from able-bodied athletes and cyclists; and

(b) used witches' hats to demarcate the point of entry and exit from the transition area for athletes to follow.

[255] Dr James also submitted that a painted line could be used to separate the two sets of athletes.[113] That would have the effect of not having a barrier with which athletes could collide.

[256] However, the evidence of Ms Van Pooss was that she believed the erections of barriers between the two categories of athletes and in particular at the s-bend, would be hazardous because it would create a funnel and crowd able-bodied athletes together. Dr Grigg, the expert called by Dr James, opined that maintaining a separate lane for the para-athletes in wheelchairs was the simple solution to overcoming the problem of able-bodied athletes and para-athletes being on the course at the same time. Dr Grigg rejected in cross-examination that narrowing the laneway for able-bodied athletes would increase the prospect of collision, but no further evidence as to why that was so was presented.[114] Dr James contends that there was sufficient room to erect such a barrier given the s-bend was five to six metres wide.

[257] The further proposal by Dr Grigg to minimise the risk of injury was to start the para-athletes and not start the remaining sprint category of triathletes until the para-athletes had completed the course. According to Dr Grigg, it would involve

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112 Plaintiff's submissions at [23], [26], [50].
113 Exhibit 52.
114 T4-41.

planning so that the time could be extended in the event the swim leg was cancelled.[115]

[258] Ms Van Pooss and Mr Ray gave evidence of the logistical exercise of running a triathlon which required permits from DTMR to close roads in consultation with QPS and the mobilisation of police and volunteers to attend different points of the course. That negotiation takes place well in advance of the event. Based on her experience, Ms Van Pooss was of the view that it was too late to try and extend the time of the road closures when the swim leg was cancelled.

[259] The evidence supports that it would be a considerable logistical exercise to extend the times of the road closures and even more so to extend the run leg to be a single five-kilometre length rather than completing two legs of a two-and-a-half-kilometre circuit. There was no evidence as to whether it could be achieved within the timeframe available for the event and I find in the circumstances in which the incident occurred it would have been a difficult exercise which was unlikely to be able to bear fruit in the time available. To the extent Dr Grigg suggested that it would be reasonable to have a road "in reserve" for use in circumstances such as USM found itself it was plain he had not investigated the logistics involved in that to suggest that it was logistically possible or a reasonable step that would be taken by a reasonable person in the position of USM.

[260] Counsel for Dr James also suggested instructions be provided to the able-bodied athletes to keep to the left however accepted in submissions that it was not a strong point given it was accepted by Dr James that she abided by that rule and Ms Daamen gave evidence that there was such a protocol which applied to triathletes on the course and was a matter of common sense. However, it was not abandoned given it was not the subject of an explicit instruction. The evidence in this respect supports the fact that a reasonable person in the position of USM would not give such an instruction because it was a standing protocol amongst athletes and would reasonably assume that athletes would generally keep left unless overtaking as a matter of common sense, and I will not consider it further. In any event the failure to provide such an instruction could not be causative of any injury given Dr James was aware of it and I have found she was generally travelling to the left.

[261] As to the matters required to be considered under s 9(2) of the CLA:[116]

(a) The probability that harm would occur if care were not taken: I consider the probability of a collision of the type occurring was reasonably low for the reasons outlined above.

(b) The likely seriousness of harm: I consider that there was a likelihood of serious harm if care were not taken. USM accepts that if a para-athlete in a wheelchair travelling at some considerable speed collided with an able-bodied athlete then an injury of some severity might occur. It submits however that it is no different to able-bodied athletes colliding or an able-bodied athlete tripping and falling. I do not accept that to be the case. Given the fact that the wheelchair is a solid structure which travels where the para-athlete is travelling at a lower level than the able-bodied athlete, the risk is not the

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115 T4-44.

116 Which USM addresses at [107] of their submissions.

same. The speed at which they would collide would likely be greater given the greater speed capacity of a wheelchair (although that would vary with the strength of the athlete concerned) and the force of the impact would likely be greater than two able-bodied athletes colliding or an able-bodied athlete tripping or falling. In my view, there is a risk of a severe injury.

(c) The burden of taking precautions to avoid risk of harm: I accept that taking steps to have the para-athletes in wheelchairs, of which there were eight in number, compete separately from the events at different times would have cost implications because of the need to extend the time of road closures by approximately 40 minutes,[117] although there is no evidence before me as to the extent of that cost. The logistical exercise of extending the event would also be not insignificant and difficult. While I accept it would have been difficult and the evidence does not support the fact it was logistically possible in the circumstances, the onus being on the plaintiff. However, for the reasons set out above, I find it would not be a significant burden either in terms of cost or logistically difficult for USM to provide barriers, particularly if confined to the 'pinch point' where the s-bend was located. Given the width of 5-6 metres I for some 20-30 metres in length it would not have been unduly onerous and USM had the relevant means and expertise to implement such barriers given it had done so elsewhere.

(d) Social utility of the activity that creates the risk of harm: While the event is operated as part of USM's business for which a fee is paid and is a money-making venture, it is an inclusive event open to people of all ages and abilities which according to both Dr James and Ms Daamen has resulted in a strong community who participate in and value the event. USM contributes to the community by providing such an inclusive event. However, the activity itself does not create the harm. It is the way in which the event was conducted and potentially the way that athletes conduct themselves which created the risk of harm rather than the event itself. I accept that given the community-based nature of the event, there would be significant negative social consequences that would result for para-athletes and indeed the broader community if para-triathletes were excluded from the event having regard to the community values of inclusivity. It is of relevance in assessing what steps would be taken by a reasonable person. Modern Australian society expects that sporting events should include such as triathlons should include para-athletes. That does not, of course, mean that reasonable precautions may not need to be taken in order to ensure events can be carried out safely,[118] but those precautions should not be to simply exclude para-athletes to eliminate the risk unless there is no reasonable means of including them in the competition to ensure the safety of all athletes.

[262] The onus lies on Dr James to persuade the court that a reasonable person exercising reasonable care would take the steps proposed in response to the risk of harm. As

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117 The para-athletes in wheelchairs commenced at 7.51 am and finished by 9.07 am, with the slowest taking 75 minutes and 25 seconds. The enticer athletes started 13 minutes before the slowest in the sprint category took two hours, 20 minutes and 54 seconds, so keeping the separation between the enticer and sprint categories of athletes and starting them when the last wheelchair athlete finished would mean that the event would not be able to be completed with the time allowed by permits.

118 *Wilson v Nilepac Pty Ltd (t/as Vision Personal Training) Crows Nest* [2011] NSWCA 63 at [130] per Tobias JA, Beazley JA agreeing.

stated above, the exercise is to be considered prospectively and not with the benefit of hindsight.

[263] As set out above, Dr James contends that with the knowledge that USM had of the way Mr Chaffey competed in such events, which had been acknowledged by Ms Van Pooss and was reflected in his conduct in the present case by seeking to overtake at high speed, a reasonable person would not have proceeded with the duathlon in circumstances where para-athletes in wheelchairs and able-bodied athletes would occupy the course simultaneously. Dr James appeared to contend that by having Mr Chaffey on the course with the able-bodied athletes, USM in effect created a dangerous situation in a similar way to that discussed in *Haddad.*

[264] USM contends that given the inclusionary community-based event which is operated by it, and which is conducted over a large area requiring the use of public space impeding the operation of businesses and the movement of residents in the area, it was not required to take any of the steps contended for by Dr James. In particular, USM submissions include that:

(a) it was only on the day before the event that the organisers realised they had to significantly alter the event which resulted in a decision, said to be properly made on cogent evidence of safety, that still enabled all competitors to participate over three legs, rather than cancelling the event;

(b) the para-athletes in wheelchairs only numbered eight compared to some 1,271 able-bodied athletes with the event occurring over a vast area;

(c) there is an inherent risk that athletes will collide in the conduct of a sporting event. The risk that athletes may collide in a triathlon is not confined to collisions between a para-athlete and an able-bodied athlete. There is a risk that able-bodied athletes may run over in the run leg or swim leg, the cycling leg or in the transitions;

(d) the vast majority of competitors of those in the enticer and sprint categories (98 per cent) accept the very slightly increased risk of a collision with a para-athlete in a wheelchair for the purposes of conducting the event efficiently and as part of the inclusive culture of triathlons.[119] No evidence to that effect was presented;

(e) given the risk of collision is recognised as being at its highest at the start, wave starts or rolling starts are used to minimise the risk referred to in (c) above, but the risk can never be prevented. In particular, the para-athletes were started earlier than the enticer or sprint categories to minimise the risk of para-athletes in wheelchairs coming into contact with others;

(f) the timeframes provided for the conduct of the events under the permits granted compelled having para-athletes and able-bodied athletes on the course at the same time. In that regard USM also points to the fact that Dr Grigg never posited a proposal to have the categories separately compete within the time frame of the permits although that was one of the precautions posited at trial;

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[119] Defendant's outline of submissions at [119].

(g) USM was entitled to assume that all athletes, including Dr James and Mr Chaffey, would abide by the rules and protocols of a triathlon which included a protocol that athletes keep to the left and overtake to the right, and rules that athletes were not to obstruct or interfere with other athletes and would look out for the safety of other athletes as well as themselves. Compliance with the rules and protocols would have largely eliminated the risk; and

(h) none of the proposals raised by Dr Grigg obviated the risk or addressed the practicalities of what steps would be needed to be taken to implement the proposal when notice of the need to change in the course only occurred the day before.[120]

[265] While the risk of a para-athlete and an able-bodied athlete colliding would be eliminated by conducting their events separately, it must be borne in mind that the duty of care is not to prevent the risk occurring but rather to take reasonable steps to avoid the foreseeable risk occurring. Reasonable care does not require the complete elimination of risks.[121]

[266] The obviousness of the risk of the injury may also bear upon whether USM acted unreasonably in not warning Dr James of the danger or not taking other steps.[122]

[267] In determining whether a reasonable person would have taken precautions against the risk, a reasonable person would have taken into account that Dr James chose to participate in an event in which there were, as part of deciding to compete, risks of injury of which she was aware that could not necessarily be eliminated. As was submitted by USM, irrespective of the rules there will be inescapable risks in the conduct of sporting events such as a triathlon. However, that does not mean she assumed any risk associated with competing in the event.

[268] In a case involving a different context from the present, *Agar v Hyde*,[123] Gleeson CJ commented in relation to participation in sporting events that:

> "Voluntary participation in a sporting activity does not imply an assumption of any risk which might be associated with the activity, so as to negate the existence of a duty of care in any other participant or in any person in any way involved in or connected with the activity. That, however, is not to deny the significance of voluntary participation in determining the existence and content, in a given case, or category of cases, of an asserted duty of care.
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> People who pursue recreational activities regarded as sports often do so in hazardous circumstances; the element of danger may add to the enjoyment of the activity. Accepting risk, sometimes to a high degree, is part of many sports. A great deal of public and private effort, and funding, is devoted to providing facilities for people to engage in individual or team sport. This reflects a view, not merely of the importance of individual autonomy, but also of the public benefit of sport. Sporting activities of a kind that sometimes result

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120 Defendant's outline of submissions at [111]-[112] and [116].
121 *Vairy v Wyong Shire Council* (2005) 233 CLR 422 at [49].
122 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [143] per Hayne J.
123 (2000) 201 CLR 552 at 561-2.

> in physical injury are not only permitted; they are encouraged. Sport commonly involves competition, either between individuals or teams. A sporting contest might involve body contact where physical injury is an obvious risk, or the undertaking by individual competitors of efforts which test the limits of their capabilities in circumstances where failure is likely to result in physical harm. Rules are of the essence of sporting competition. Individuals, or teams, wishing to compete must agree, personally or through membership of some form of association, upon the rules which will govern their competition…"
> (footnotes omitted)

[269] There are inherent risks in any sport including a triathlon. That does not mean they can simply be ignored if there is a foreseeable risk of injury. Nor will the law necessarily accept the rules or practices of sporting bodies as setting the law's standard of reasonable care.[124]

[270] As is apparent from the case of *Haddad*, if a person brings together a crowd of people and organises their participation in activities in which injuries happen to occur, he or she will ordinarily owe to those people a duty in respect of the dangers which have been created. That case was factually quite different to the present, insofar as the inexperienced skaters were made to leave the rink where they were and join in the skating rink where there were many experienced skaters with no added supervision. Dr James was not an inexperienced triathlete, although the duathlon course set up was different from the triathlon with which she was experienced. However, like other athletes in the sprint category she was a slow runner. There was a mix of athletes of varying ability in the sprint category. A para-athlete in a wheelchair being on his or her final leg and having the capacity to increase their speed when the sprint category were on their first leg and still in the process of dispersing according to their ability, creating a situation of significant risk of injury through a collision or clipping of the other athlete where the wheelchair para-athlete was manoeuvring through athletes in the sprint category.

[271] Athletes such as Mr Chaffey had the potential to misjudge situations and inadvertently or even negligently pose some risk to other athletes. [125] I accept that given his past conduct which showed a preparedness to act in a way contrary to be considerate of the safety of others by travelling hard and very fast such that his conduct posed a hazard to other athletes

[272] In allowing the para-athletes to overlap with sprint category athletes where USM knew that there were also elite competitive para-athletes such as Mr Chaffey.

[273] Given the above matters in respect of the conduct of the duathlon, USM did create a situation of danger by having both para-athletes in wheelchairs and able-bodied athletes in the sprint and enticer category on the course at the same time. That is not to say it would have been the same position in the conduct of a triathlon when para-athletes in wheelchairs and able-bodied athletes were on the course at the same time

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124 *Woods v Multi-Sport Holdings Pty Ltd* (2001) 208 CLR 460 at [105] per Kirby J.

125 As to which see *Anderson v Mount Isa Basketball Association Incorporated* [1997] QCA 340 ("***Anderson***") at 6-8 per Davies JA and Denmack J.

125 *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 243 CLR 234 at 246.

given the different start times and inclusion of a swim leg and absence of two run legs.

[274] Unlike the triathlon, the duathlon had two run legs, one two-and-a-half kilometres and the last five kilometres, which involved two laps of two-and-a-half kilometres. The course was changed from one which ran in a clockwise direction to an anti-clockwise direction. Had the original design been maintained, competitors would have entered the course by taking the topmost route and they would continue to run straight ahead, effectively in an easterly direction. Had that been the case, they would not have had to negotiate the s-bend to reach the point where Mr Chaffey and Dr James collided.[126] According to Ms Van Poos, that was done to allow a large enough area to corral athletes who had not yet started and to minimise the crossover of when athletes were starting, re-entering transition after their run or exiting on their second run. While the design of the course was not impugned by the evidence at trial, the change in the course raised additional considerations that required USM to take further reasonable steps to avoid the risk of injury of those in wheelchairs and able-bodied athletes colliding given the potential time where there would be an overlap between the athletes and para-athletes in wheelchairs, particularly when the overlap was likely to occur as the athletes in the sprint category were on their first leg and the competitive para-athletes were likely to be on their last leg.

[275] As Ms Van Pooss stated in her evidence, USM was aware there was a risk of collision between para-athletes and able-bodied athletes competing together[127] and therefore started para-athletes earlier, with the aim of reducing the time para-athletes and able-bodied athletes were on the course at the same time. Ms Van Pooss rejected the proposition that a hard barrier or cones could be placed on the course, as she considered it would create greater danger to able-bodied athletes due to the funnelling effect. While a solution which substituted one danger for another danger would not be a reasonable precaution that would be taken by a reasonable person, I found her answer was given on the fly and do not accept her evidence in this respect for the reasons outlined above.

[276] USM, through Ms Van Pooss, was aware of the particular risks of collision and potential injury that arose if para-athletes were on the course at the same time as the sprint athletes. In changing to the duathlon where there were three legs with a repeat leg insofar as the first and last leg were run legs, the potential overlap occurring when competitive para-athletes were likely to be on the final leg where they could encounter slower athletes participating in the sprint category. While para-athletes and able-bodied athletes had shared the course before in the GCT, the structure of the course did not involve a repeat run leg. The risk of collision between an able-bodied athlete and the para-athletes in wheelchairs would not have been assumed by the competing athletes, even if it may have been identified as a risk had it been considered by some of the athletes and para-athletes such as Ms Daamen and Mr Chaffey who were competing and had experience of racing before on the same part of the course at the same time in other unidentified triathlons. Nor given the last-minute change to the duathlon, the danger would not have necessarily been apparent. While there was evidence the change in the course was notified to

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126 T5-14.
127 T 5-11/1-7.

athletes[128] and announcements were made over the loudspeaker, there was no evidence that there was notice given to any of the athletes of the particular risk of the overlap between para-athletes in wheelchairs and the other able-bodied athletes on the same part of the course at the same time, particularly where it narrowed.

[277] I do not consider that USM could assume all the athletes would abide by the rules or protocols or assume that errors of judgments would not be made by the athletes. In the present case, I consider that USM ought to have known that a para-athlete of Mr Chaffey's level would be accelerating towards the finish with significant speed and pushing the boundaries when confronted with slower able-bodied athletes, particularly at corners where athletes would be bunching up and would seek to overtake them. USM could not in those circumstances have safely assumed all athletes would hug the race line so as to leave sufficient room for overtaking where there was a curve or bend, particularly if an athlete came from behind at speed with little warning in a wheelchair.[129]

[278] While I accept it would be difficult for USM to intervene to prevent an athlete from acting outside the rules during a race, I do not consider that a reasonable person in the position of USM would have relied on the athletes abiding by the rules, particularly with knowledge that para-athletes with wheelchairs were highly competitive and competing for rankings and would be travelling at significant speeds to achieve the best time with a significant risk that they would be encountering athletes in the sprint category who would not necessarily be competitive and accomplished athletes given the risks of injury if they did come into contact with each other. That was a significant risk where a para-athlete would be seeking to overtake them including where there was a risk of the athletes being more concentrated due to the narrowing of the course at the S bend.

[279] I am satisfied that a reasonable person in the position of USM, an experienced operator of such events, would have taken additional precautions to control the risk of a para-athlete in a wheelchair being on the course at the same time as an able-bodied athlete to those taken by USM given that:

(a) the risk of serious injury posed by a collision between a para-athlete in a wheelchair and able-bodied athlete is likely to be greater given the potential speed differential between the para-athlete and the able-bodied athlete, and that the wheelchair is a solid structure;

(b) while Ms Daamen had raced with para-athletes in wheelchairs before and was aware of the sound of them approaching, that was not necessarily a common experience to all competing athletes including Dr James given para-athletes were started at a different time and relatively few in number. Ms Daamen's evidence was that the times when they were on the course at the same time varied depending on the start times and event. Therefore, the likelihood of other athletes failing to observe the risk and avoid it was not remote, particularly when the para-athlete was coming from behind;[130]

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128 The fact that there were three legs, and it was to be run in an anti-clockwise direction p 312-313 Affidavit of Van Poos

129 Cf Van Pooss Affidavit at [88]: while it was a practice to do so it was not enshrined in a specific rule.

130 Cf *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234 at [36].

(c) USM was aware of the risks of the collision between para-athletes in wheelchairs and able-bodied athletes. Given that there was no initial swim leg separating athletes and there was an initial run leg and final run leg, there was a reasonable likelihood that that the two categories of athletes would be on the run leg at the same time at different stages of the race for each category, one starting and the other finishing and encounter each other where the course narrowed particularly where the course narrowed some 100 metres from the turn off for the finishing line;

(d) the duathlon had changed the course the athletes were to compete on from the triathlon so no athletes were familiar with the course and where there was greater congestion with the rolling start, which would not necessarily have fully dissipated over the first run leg by the time the course narrowed at the s-bend given the number of athletes; and

(e) the change to the duathlon resulted in two run legs, one at the beginning and one at the end, which, notwithstanding the earlier start of the wheelchair athletes, provided an increased risk given there was a reasonable likelihood that they would be on the course at the same time at different points in the race, the able-bodied athletes in the sprint category beginning the race while the para-athletes were on their last leg, particularly with competitive athletes such as Mr Chaffey accelerating to reach the finishing line pushing the boundaries in a way that may breach the rules, particularly at points where the course narrowed.

[280] I am not satisfied however, as submitted on behalf of Dr James, that a reasonable person in the position of USM would have, in the circumstances of having to change from a triathlon to a duathlon in a reasonably short time-frame and when permits as to road closures had already been obtained and athletes had already paid their entry fees to compete, would have sought to have the para-athletes start and complete the para-athletes prior to commencing the enticer and sprint categories of able-bodied athletes (or after). In the circumstances where time was limited by the time for which road closures were permitted a reasonable person would have considered that the precautions were too burdensome compared to the magnitude of risk and probability of harm given that:

(a) the possibility that the swim leg would have to be cancelled due to water purity issues only arose on the day before the event;

(b) I accept the evidence of Ms Van Pooss that it would not have been possible to extend the permits to allow extended road closures with such short notice[131] given the co-ordination required with QPS and DTMR prior to the event as well as the support volunteers and staff such as medical staff required for the event. Although that was a matter within USM's power and USM did not seek to see if it could extend the time the roads were closed, the evidence of Ms Van Pooss and Mr Ray supported the fact that there was a considerable amount of time and co-ordination required to obtain such permits. Dr James did not present any evidence to the contrary.

(c) there were only 10 para-athletes, of which eight used wheelchairs and two were visually impaired, compared to some 1,271 athletes in the enticer and

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131 Van Pooss Affidavit at [76].

sprint categories who would be delayed by having the para-athletes start and complete their event first. The elite athletes and super kidz events were established separate events which were run separately whereas para-athletes had been on the course at the same time as the sprint athletes in prior years;

(d) to exclude the para-athletes in wheelchairs would affect the social utility of the inclusive event.

(e) there is no evidence that the nature of the competition in the context of the Olympics, Commonwealth Games and World Championships where the para-athlete events are run separately bears any similarity to the present event or operate in that way due to safety concerns. There was also evidence given by Ms Van Pooss gave that USM had run a number of other events where able-bodied athletes and para-athletes in wheelchairs shared the course at the same time.

(f) Dr Grigg's proposal that the events be run separately, or some legs delayed to allow for the para-athletes to complete the leg before the other athletes commenced failed to consider the practicality of changing the arrangements as to road closures and the support staff and volunteers necessary to allow the event to occur. The suggestion that a further road closure should have been kept in reserve to cater for a change to a duathlon lacked any air of reality and failed to address the logistical exercise to have such an arrangement in place "just in case."

(g) while Ms Van Pooss' conversation with Dr James demonstrated that USM through Ms Van Pooss was aware that Mr Chaffey was a hard competitor, I do not accept, as was submitted on behalf of Dr James, that the knowledge that "He goes very fast. He goes hard. He always comes out of his wheelchair"[132] would have led a reasonable person in the position of USM to seek to exclude the para-athletes in wheelchairs from the event given the risk could reasonably addressed by providing for barriers to separate the two categories of athletes in the "pinch points" of the course, in particular the S bend.

[281] I do however consider that a reasonable person in the position of USM would have identified those parts of the course which narrowed and where athletes were likely to bunch up and have erected barriers similar to those used to separate cyclists or witches' hats with signs directing the athletes and para-athletes as to the side which they were to separate them, given the risks of collision in the circumstances outlined above. In the present case the evidence supports that was the area described as the s-bend. That is supported by the fact that:

(a) the provision of barriers with signage to direct the athletes and para-athletes as to which side they were to go was a relatively inexpensive and simple exercise. USM already used such barriers to separate the cyclists and witches' hats to demarcate points of entry and exit.[133] While the proposed delineation would in this instance only be for part of the run leg, the fact that such barriers were otherwise used to keep athletes on the correct course supports

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132 T1-50/1-8.

133 Van Pooss Affidavit at [70 (c) and (d)].

the fact that USM had the expertise and means to use such barriers at what is described as the "pinch points";

(b) although the risk of harm was not as high as in relation to para-athletes in wheelchairs and other athletes on the run leg compared to cyclists and other athletes on the run leg, there were similarities because of the potential speed differential between para-athletes in wheelchairs and other athletes on the run leg and both involved the use of a solid machine;

(c) where there was an overlap and the para-athlete was travelling at speed towards the finishing line where the s-bend was only some 100 metres from the turn off from the finishing line, the para-athlete could be travelling up to twice the speed of able-bodied athletes. If the para-athlete was travelling at speed it would give little time for an able-bodied athlete to move when the para-athlete came from behind and if they were not travelling on the race line and the para-athlete would likely to seek to manoeuvre around them;

(d) there was a width of five to six metres at the s-bend which was of a sufficient width to have separation barriers given that although that I have found there were more athletes than normal, it was likely to be only four to six together on the bend at the one time, which could be accommodated by a barrier at the half way point. As the evidence of Ms Van Poos is that the racing wheelchairs were 1.5 metres long it is unlikely that they would be greater than 2 metres wide; and

(e) while Ms Van Pooss stated that it was not operationally feasible to provide barriers and it would have a funnelling effect for the able-bodied athletes which may increase the risk of injury, I did not find that evidence persuasive. Barriers were used to separate cyclists and crowds on the course. They were also used in parts of the course where needed rather than extending over the whole course. USM was experienced in using such barriers and delineation markings. Although I consider that there were more athletes concentrated together in close proximity to each other than normal, given the staggered rolling start, the evidence indicates that the numbers were in the high single digits by the time the parties reached the s-bend. Given the width of the corner was six metres, a barrier dividing the two to separate the para-athletes in the wheelchairs should have provided sufficient width for the athletes to safely get around the corner without significantly increasing the risk of able-bodied athletes colliding. While that may have limited the ability of athletes, particularly para-athletes to pass, it would have been for only a short part of the course, and they would have still had approximately a 100 metre straight to reach the finishing line.

[282] While it is true, as USM submits, that a para-athlete in a wheelchair travelling behind an able-bodied athlete could vary his or her speed to adjust to the athletes running in front of them, USM could not reasonably rely on that occurring. Given the fact that the para-athletes in wheelchairs would be in their final legs and included competitors such as Mr Chaffey who were seeking to gain competition points, USM should have anticipated that there was a real risk that there would be an acceleration in the area around the s-bend by a para-athlete and manoeuvring to overtake where there was likely to be at least a number of able-bodied athletes going around the s-bend at the same time. USM were aware of para-athletes such as Mr Chaffey in the past pushing boundaries and travelling at significant speeds

which were arguably excessive in previous races. Mr Chaffey's actions in this race could not simply be regarded as an aberration and given an awareness of the danger that created in terms of collision, a reasonable person in the position of USM would have taken further precautions than those taken by USM.

[283] The present case is not one where USM could rely on athletes complying with the Rules to ensure the safety of all athletes and address the risks of collision or take the view there was nothing that could be done to control actions such as Mr Chaffey's actions and that they should be seen as maverick acts which could not reasonably be avoided by the taking of any precautions.

[284] While the guidelines for triathlons provide that an athlete must take care of their own safety, it is still a competitive environment and a reasonable person in the position of USM would not rely on the Rules or protocols to diminish the risk of collision to an acceptable level, particularly where the risk of serious injury was high. A para-athlete who sees runners in front of him and wants to take the opportunity to pass may not be able to avoid coming into contact with those runners if he cannot slowdown in time, or may misjudge the situation in an area which is more confined than elsewhere.[134] Similarly, the rule that an athlete must not obstruct or interfere with the forward progress of another competitor or jeopardise the safety and welfare of another competitor, does not address the risk of someone moving around another athlete at the same time as a para-athlete in a wheelchair is speeding up from behind and seeking to overtake.[135] The rules are also non-specific and open to interpretation by a particular athlete which could differ considerably in a competitive environment.

[285] I therefore find that Dr James has established that USM breached its duty of care in not providing a barrier, either hard or soft leading from the orange concrete path around the 's-bend' as the parties entered Mitchell Park to the end of the S bend to separate the para-athletes in wheelchairs from the able -bodied athletes under s 9 of the CLA with signage to direct the relevant side they were to travel on. My finding would have been the same had I considered the question of breach at common law by reference to the test set out by Mason J in *Wyong's* case.

[286] While the plaintiff raised that the categories of athletes could have been separated by painted delineation on the ground that was not a method that had been used by USM in other triathlons to separate athletes and no evidence was given as to the effectiveness of a delineation which would require athletes to look down. I therefore do not consider it further.

[287] As to the contention that it was a breach not to provide specific directions to athletes and para-athletes about overtaking, the evidence does not suggest that such a direction, in terms which were not articulate by the plaintiff, would have necessarily been followed by an para-athlete such as Mr Chaffey in the circumstances. I do not therefore consider it is a reasonable precaution that would have been taken.

[288] Given these findings and that the plaintiff did not seek to develop the other pleaded breaches in her submissions I will not consider the further pleaded breaches.

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134 T 4-35.

135 Rule 1.1(k) of the Rules.

Section 60 of the Australian Consumer Law

[289] A number of criticisms arose in relation to the pleading or rather lack thereof by Dr James of matters sought to be relied upon in final submissions, some of which I have canvassed above. In particular, there was an issue of considerable dispute between the parties as to Dr James' reliance on s 60 of the ACL which was the focal point of Dr James' final submissions. Notwithstanding I have found a breach of duty under the CLA, Dr James' reliance on s 60 is of some importance because it would exclude the application of the defences relied upon of inherent risk or obvious risk under the CLA. It is necessary to set out some history of the matter.

[290] Paragraph 2A and 2B of the FASOC pleads that:

> "2A. Pursuant to s 60 of Schedule 2 ("The Australian Consumer Law") to the *Competition and Consumer Act 2010* (Cth), there was implied within the agreement a guarantee that the defendant's services of and incidental to the plaintiff's competing in the GCT would be rendered with due care and skill.
>
> 2B. Further or alternatively, it was an implied term of the agreement that the defendant would take reasonable care for the safety of the plaintiff while she was competing in the GCT."

[291] In the FAD, USM pleads in [1A] and [1B] that:

> "1A. As to paragraph 2A of the statement of claim, the defendant:
>
> (a) denies because it is untrue that the Australian Consumer Law **('ACL')** was applicable to the relationship which existed between the plaintiff and the defendant;
>
> (b) says there was not, and did not exist, any implied term in any contract to guarantee that the defendant's services of and incidental to the plaintiff's competing in the GCT would be rendered with due care and skill;
>
> (c) says that in any event, the GCT was conducted with due care and skill having regard to the size of the event and the number of participants.
>
> 1B. As to paragraph 2B of the statement of claim, by reason of the matters pleaded in paragraph 1A aforesaid the defendant denies there was an implied term of any agreement that the defendant would take reasonable care for the safety of the plaintiff while she was competing in the GCT."

[292] As the question of the implied term in [2B] was not relied upon in Dr James' final submission and there is no basis identified for it being implied as a matter of law or fact, nor was there any submission made identifying the agreement although the FASOC based it on the payment of an entry fee by Dr James to USM. USM agreed a fee had been paid but characterised it as a fee for participation only. There is an insufficient basis for the implication of such a term and I will not consider it further.

[293] Section 60 of the ACL provides that:

> "**60 Guarantee as to due care and skill**
>
> If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill."

[294] USM in its final submissions submitted that:[136]

> "These allegations can be easily dealt with. As has been recognised by the case law,[137] the provision in section 60 of the *ACL* is quite different to its predecessor, section 74(2A) of the *Trade Practices Act 1974* (**TPA**). The TPA provision was not expressed in terms of a guarantee but in the terms of an implied warranty incorporated into the contract between the supplier and the consumer.
>
> Consequently, there is no guarantee 'implied within the agreement' nor is there any 'implied term' to take reasonable care for the safety of the plaintiff. If there were such an implied term it would still be subject to the provisions of the CLA."

[295] In response, Dr James submitted that:[138]

> "The defendant takes a pleading point to assert that, because the words "implied within the agreement" are used in s 2A of the Further Amended Statement of Claim, there can be no reliance by the plaintiff on the ACL guarantee.[139] Respectfully, the point is taken speciously. Without the ACL provision, no such guarantee would be operative. To plead that the guarantee is "implied" reflects no more than that it is not "expressed" in the agreement between the parties. If need be the Plaintiff seeks leave to amend paragraph 2A of the Further Amended Statement of Claim by deleting therefrom the words "*implied in the agreement*"."
>
> (emphasis added)

[296] As USM submitted, under s 60 of the ACL, there is no implied guarantee in the agreement. That is different from its predecessor, s 74(2A) of the *Trade Practices Act* 1974 (Cth) ("**TPA**") which provided for an implied warranty incorporated into a contract between a supplier and a consumer. USM, therefore, submits that the claim is misconceived given s 60 of the ACL provides for a standalone agreement and therefore a finding should be made that Dr James has not established her claim, notwithstanding that s 60 of the ACL was expressly mentioned. As the FASOC stands, USM submits it does not disclose a cause of action and Dr James should not now be permitted to pursue a case based on the standalone guarantee.

[297] Dr James' contention is that even if the court finds there is no such term implied in the agreement, s 60 would otherwise apply to provide a guarantee of services and

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136 Defendant's submissions at [99]-[100].
137 See *Castle v Perisher Blue Pty Limited* [2020] NSWSC 1652 at [213].
138 Plaintiff's submissions at [7].
139 Defendant's outline, paragraphs 99-100.

given the reference to s 60 of the ACL in [2A] of the FASOC the reference to "there was implied within the agreement" is of no significance. Dr James submitted that:[140]

> "At a factual level, s 60 is engaged here as all of its constituent ingredients are satisfied inasmuch as –
>
> (a) a "person",[141] namely, the defendant;
>
> (b) in, at the very least, "commerce";[142]
>
> (c)"supplied", in that the defendant "provided", "granted" or "conferred";[143]
>
> (d) "services", namely, the organisation and facilities whereby the plaintiff could participate in the triathlon;
>
> (e) to a "consumer",[144] namely, the plaintiff.

[298] None of the material facts for the application of s 60 of the ACL were pleaded. USM does not contend that the statutory requirements for the guarantee in s 60 of the ACL to apply are not otherwise met in the present case. USM however submits that Dr James is bound by her pleading and that it has responded to the case pleaded.

[299] In relation to the comment by Dr James' counsel that leave would be sought "if necessary", counsel for USM stated that the court should refuse such an amendment in relation to the pleading at this stage of the proceeding if in fact leave to amend was sought. USM claims that had Dr James pleaded the guarantee rather than that the guarantee was an implied term in the agreement, it would have pleaded a waiver contained in clause 27 of the registration document provided by Dr James, which it contends was only relevant to the pleading in [2A] of the FASOC.[145] That provision provides that:

> "27. USM is providing a recreational service within the meaning of the Australian Consumer Law and that USM excludes any liability for the death, physical or mental injury (including the aggravation or recurrence of such an injury), the contraction, aggravation or acceleration of a disease, the coming into existence the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to a participant that is or may be harmful or disadvantageous to the participant or the community or may result in harm or disadvantage to the participant or the community.
>
> Queensland.
>
> By signing this form, you agree that the liability of USM Events Pty Ltd in relation to recreational services (as that terms is defined in the Competition and Consumer Act 2010 (Cth) and the Australian

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140 Plaintiff's submissions at [3].
141 See 2C ("References to persons") of the *Acts Interpretation Act 1901* (Cth.).
142 T5-5.34-45; and see the definition of "trade or commerce" in s 2 of the ACL.
143 See the definition of "supply" in s 2 of the ACL.
144 See the definition of "consumer" in s 3 ("Meaning of consumer") of the ACL.
145 Exhibit 50.

> Consumer Law) or dangerous recreational activity (as that term is defined in the Civil Liability Act 2002 (NSW), Civil Liability Act 2003 (Qld) and the Civil Liability Act 2002 (WA)) for any:
>
> (a) Death; or
>
> (b) A physical or mental injury of an individual (including the aggravation, acceleration or occurrence of such an injury of the individual); or
>
> (c) The contraction, aggravation or acceleration of a disease of an individual; or
>
> (d) The coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual:
>
> i. That is or may be harmful or disadvantageous to the individual or community; or
>
> ii. That may result in harm or disadvantage to the individual or community.
>
> other than that which was caused by reckless conduct."

[300] Dr James contends that USM well knew that s 60 of the ACL was being relied upon and had responded to it in its defence. It further contends that there is no prejudice suffered by USM as it should have pleaded the waiver in any event including the case in negligence if it wished to rely on it. However, USM rejected that on the basis that the waiver did not apply to the common law but did apply to claims under the ACL services provision. That has substance insofar as the waiver is directed to a "recreational service" within the meaning of the ACL. USM contends it was not obliged to plead the waiver because that was not the case against them.

[301] I directed that USM be given the opportunity to provide submissions as to why the waiver should be allowed to be raised and how it would operate if any amendment of the FASOC was to be made. I also directed the parties to provide submissions as to the proper basis for damages to be assessed if s 60 of the ACL applied. In that respect, Dr James had conceded she had claimed general damages in accordance with the provisions of the CLA, but otherwise contended that consistent with the calculation of damages under the ACL, the court should calculate damages in the same way as a common law damages claim.

[302] Further submissions were provided by each party which resulted in Dr James identifying s 267 of the ACL as the appropriate basis of damages if s 236 of the ACL was not. Dr James also made various concessions in relation to damages in certain respects thereby abandoning the right to claim some of the damages which otherwise may be claimed under the ACL. USM submitted that the court should not permit any amendment to the pleading in relation to the claim under s 60 ACL, and further that Dr James should not be permitted to claim damages in accordance with s 267 of the ACL, as that had not been pleaded as the basis upon which damages was claimed.

[303] USM contends in its supplementary submissions that Dr James has not taken action as a consumer under s 267 of the ACL and therefore relief under s 267 could only be claimed by Dr James seeking an amendment. It contends that consistent with the High Court decision of *Moore v Scenic Tours Pty Ltd*,[146] s 236 of the ACL does not apply to personal injuries' claims.

[304] USM further stated that Dr James had not sought leave to amend, and if she wished to do so she should make an application, and present to the court the pleading upon which she proposed to reply. It noted Dr James had not sought such leave.

[305] In providing its submissions USM made no submissions as to the operation of the waiver which would go to the question of any prejudice, and also to the case it would raise if the amendment were permitted. Out of fairness, I subsequently requested USM to confirm whether it had raised the full extent of the matters it wished this court to consider, noting it had not raised anything about the operation of the waiver.

[306] Having extended the time for response by USM, USM provided further submissions rather than just responding to the question.

[307] In the interests of expediency, I listed the matter to determine whether I should accept USM's further submissions or not. At that hearing, counsel for USM again reiterated USM should not have to respond about the waiver unless Dr James was seeking to actually amend her claim, rather than hedging its bets so to speak to only seek the amendment if necessary. USM also raised the fact that Dr James had not relied on either s 236 or s 267 of the ACL in her damages claim, and the FASOC would also require amendment for it to be made. Upon seeking clarification of Dr James' position, Dr James' counsel indicated that at that point in time they had no instructions to seek an amendment.

[308] The result is rather unsatisfactory and much of the exchanges above as to waiver proved to be an arid exercise. I therefore determined that I would not consider USM's further submissions and that the matter on the pleadings as they stand. In doing so, I will consider whether the pleading is sufficient as it stands or whether a further amendment would be necessary. Given the parties positions, particularly Dr James', I will not anticipate whether such an amendment would be allowed.

[309] In some respects, reliance on s 60 of the ACL does not differ markedly from a breach of duty at common law. It has been held that the reference to "due care and skill" is a common law negligence standard.[147] It is clear the provision unlike its predecessor does not only arise where there is a contractual relationship between the parties. In *Wade*, O'Bryan J referred to *Moore v Scenic Tours*[148] where Sackville JA (with whom Payne JA and Barrett AJA agreed) considered that ss 60 and 61 of the ACL are not confined to services supplied pursuant to a contract, and the fact that there is a contract between the parties does not compel a conclusion that the

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146 (2020) 268 CLR 326.

147 *Wade v J Daniels Associates Pty Ltd* [2020] FCA 1708 ("***Wade***") at [330]; *Let's Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 at [6].

148 (2018) 361 ALR 456 at [328]; overturned by the HCA in *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 in respect of s 275 ACL and S 16 CLA.

guarantees only apply to services that are co-extensive with the supplier's contractual obligations.

[310] However, the significant difference is its effect on the application on the CLA which applies to proceedings brought in negligence in Queensland. Given the ACL is a Commonwealth law it will prevail over any state law to the extent of any inconsistency as provided for in s 109 of the *Australian Constitution*. The significant differences from a claim in negligence is however that a number of the provisions of the CLA do not apply, which would include defences raised by USM and the damages available for breach are governed by the provisions of the ACL. In the present context, there is no dispute between the parties that if the case under s 60 of the ACL is properly raised it would have the effect that some provisions of the CLA would not be picked up by the ACL.[149] Dr James submits that ss 13-24 of the CLA would not apply.

[311] I note that the position in relation to whether or not s 19 of the CLA applies has not been determined decisively in this State. In New South Wales it has been held that the defence still applies to a claim brought under s 60 of the ACL, but the terms of the equivalent provision in New South Wales are broader than the Queensland provision.[150]

[312] USM contends that on the basis of it pursuing a case consistent with pleading there was an implication of term, ss 9 and 10 of the CLA would still apply, consistent with *Motorcycling Events Group Australia Pty Ltd*.[151]

[313] Unlike s 74 of the TPA, s 60 of the ACL is qualified by s 275 of the ACL. Section 275 provides that if there is a failure to comply with a guarantee that applies to a supply of services (which would include the s 60 guarantee) and the law of a State or Territory is the proper law of the contract, that law applies to limit or preclude liability for the failure and recovery of that liability in the same way as it applies to limit or preclude liability and recovery of any liability for a breach of a term of the contract for supply of the services.

[314] In my view Dr James has not sufficiently pleaded s 60 to properly raise a cause of action pursuant to that section, not only by its pleading of the guarantee as an implied term which in its present form is liable to be struck out, but also because of its failure to plead any entitlement to damages under the ACL. Further, while the FASOC specifically claims damages for breach of the CLA, the loss and damage pleaded in the FASOC however only pleads general damages based on the *Civil Liability Regulation 2014* (Qld) ("**CLR**"). Dr James' original submissions sought to rely on s 236 of the ACL in respect of damages. In further submissions, Dr James then raised in the alternative damages was sought in the alternative under s 267 of the ACL and made further concessions as a result of its failure to properly seek damages under the ACL in the FASOC.

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149 *Motorcycling Events Group Australia Pty Ltd v Kelly* (2013) 86 NSWLR 55 per Meagher JA in the context of s 74(2A) *Trade Practices Act 1974* (Cth); *Alameddien v Glenworth Valley Horse Riding Pty Ltd* (2015) 324 ALR 335 at [63] *Let's Go Adventures Pty Ltd v Barrett* [2017] NSWCA 243 at [5] and [6] per Basten JA and Gleeson JA.

150 *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at [28]-[29]; *Castle v Perisher Blue Pty ltd* [2020] NSWSC 1652 at [215]-[217]; Douglas, Mullins and Grant "Annotated Civil Liability Act" 5th edition, Lexis Nexis at [19.5].

151 (2013) 86 NSWLR 55.

[315] In supplementary submissions provided by Dr James it was contended that the applicable provision for damages for s 267(4) and not s 236 of the ACL. In addition to conceding that general damages should be calculated on the basis that the CLA applied, Dr James abandoned any entitlement to be awarded interest on general damages consistent with the CLA. As to economic loss and impairment of earning capacity past and future, as no limitation was pleaded by USM under s 54 of the CLA, Dr James contends that damages should be assessed in accordance with ordinary common law principles consistent with *Let's Go Adventures Pty Ltd v Barrett.*[152] Dr James also abandons any entitlement to be awarded interest on past economic loss that would be more generous to her than the statutory formula contained in s 87ZA(2) of the ACL. Dr James makes a similar concession in relation to interest or on past damages.

[316] The deficiency in pleading s 60 of the ACL in [2A] is not remedied by the remainder of the pleading such that USM could be said, notwithstanding the deficiency in pleading, to have been sufficiently put on notice as to the nature of the claim. In the present case, [10A] of the FASOC pleads: further or alternatively to the breach of duty of care, that the incident and personal injuries suffered were occasioned by the failure of USM to discharge the guarantee within the agreement. Causation as a result of the breach of guarantee is pleaded separately in [11] FASOC.

[317] No particulars were provided of the breach nor requested by USM. Given that the test for the breach of due skill and care is the same as the test for breach of duty in negligence and no separate breaches are identified, and the pleading is "Further, or alternatively", one might have assumed the breaches to be the same as those relied upon in [9] of the FASOC.

[318] However, Dr James' counsel made the rather bold submission in closing that:[153]

> "In other words, the plaintiff is not confined in her case if the defendant failed to render its services with due care and skill to the particulars outlined in paragraph 9. That means in turn, amongst other things, that the submission in paragraphs 12 and 13 of the defendant's outline in reply are simply irrelevant to the cause of action on the guarantee. At a practical level we say this: once the further amended statement of claim was filed and served, the defendant could have sought particulars of paragraph 2A, and more particularly, could have sought particulars about the respects in which it was alleged that the defendant had failed to render its services with due care and skill. It did not do so. The consequence is that there are now no restrictions on the respects in which the plaintiff is now permitted to assert a case that the defendant breached its statutory guarantee."

[319] Such a pleading cries out for the pleading of material facts and necessary particulars to confine the allegation. Such a submission is not however consistent with rr 5, 149 or 157 of the UCPR.

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152 (2017) NSWCA 243 at [154]-[165].
153 T6/ 1-46/ 36-48.

[320] In any event, what is clear is that no other paragraphs in the FASOC further clarified the case being pursued in paragraph [2A].

[321] USM did not expressly deny that there was an agreement between the parties but pleaded that the fee was only for participation.[154] USM denied that the ACL was applicable to the relationship which existed between the parties. It further denied that there was any implied term in any contract to guarantee that USM's services would be rendered with due care and skill and otherwise said that the event was conducted with due care and skill. In reply, Dr James[155] denied the defence and pleaded, *inter alia*, that there was an implied term in the contract to guarantee that USM would render services with due care and skill and contended that USM did not execute the GCT with due care and skill.[156] There was a dispute as to whether the ACL applied at all and whether there was a contract which contained an implied term on the face of the pleadings.

[322] USM also denied the allegation that if there was any guarantee which existed which was denied, USM had failed to discharge any obligation pursuant to the guarantee.[157]

[323] A party's case is defined by its pleading and the parameters of the contest as they were defined by the parties' conduct of the trial.[158] It is not a whimsical document which serves as "the vibe" in order for the actual case to be defined at a later time.

[324] In *Tapp v Australian Bushmen's Campdraft and Rodeo Association Limited* ("***Tapp***")[159] the pleading in relation to s 60 of the ACL was also pleaded as being a term of the agreement. Payne JA (with whom Basten JA and McCallum JA agreed on this point) found that the trial judge had not erred in finding that the case based on s 60 of the ACL did not succeed. The pleading in *Tapp* was in the following terms:[160]

> "Pursuant to s 60 of the Australian Consumer Law it was a term of the agreement between the defendant and the plaintiff that the campdrafting event would be organised, managed and provided with due care and skill."

[325] It is not dissimilar from the present FASOC:[161]

> "Pursuant to s 60 of Schedule 2 ("The Australian Consumer Law") to the *Competition and Consumer Act 2010* (Cth), there was implied within the agreement a guarantee that the defendant's services of and

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154 FAD at [1(f)].
155 There is a clear error in referring in [3] of the AR to [1(a)], not [1A].
156 AR at [3].
157 FAD at [9A], [10].
158 *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd (formerly t/as Stork Food Systems Australasia Pty Ltd)* (2009) 254 ALR 661 at [149] and [151] in the context of new points being raised upon appeal, referring to *Whisprun Pty Ltd (formerly Northwest exports Pty Ltd) v Dixon* (2003) 200 ALR 447 at [52].
159 [2020] NSWCA 263; Special leave granted in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2021] HCATrans 190.
160 See *Tapp* at [104].
161 FASOC at [2A].

> incidental to the plaintiff's competing in the GCT would be rendered with due care and skill."

[326] The appellant's case in *Tapp* was conducted on the basis that the statutory guarantee in s 60 of the ACL was incorporated into the contract alleged in the amended statement of claim. The primary judge found there was insufficient evidence to support a finding of a contract between the plaintiff and defendant. He therefore found there was no basis to import the term.

[327] Like *Tapp,* no attempt was made by Dr James to establish that there was an agreement between the parties although the agreement was pleaded in [2(d)] of the FASOC as a result of the payment of a fee to compete in the GCT.

[328] Unlike *Tapp*, the closing submissions in the present case however were premised on the correct basis upon which statutory guarantee in s 60 of the ACL applied and no longer relied on the existence of a contract.[162]

[329] In *Tapp* the appellant sought to raise a different case upon appeal, notwithstanding its pleading, stating "…it is not necessary that there be a contract at all. All that is required is that there be a supply of services in trade or commerce by the respondent to the appellant as consumer."[163] It was submitted the preconditions for the application of the guarantee were established on the evidence.

[330] The respondent objected to the reformulated case stating it had been denied the opportunity of meeting that case by the evidence it might have led.

[331] Payne JA[164] noted the history of s 60 and s 61 of the ACL[165] which was introduced as part of the CCA, and how these sections differed from their predecessor in s 74(1) and (2) of the TPA insofar as they provide protection to consumers by means of a statutory guarantee rather than by implying statutory warranties into contracts between corporations and consumers.[166]

[332] Payne JA concluded that the argument could not be run for the first time on appeal since the court could not be satisfied that no evidence could have been adduced by the Association which by any possibility could answer the new argument.[167] His Honour further noted that the respondent had not pleaded a contract to take advantage of any defence available by reason of s 275 of the ACL, of the kind discussed in the decision of *Menz*, which demonstrated further that the Association had lost a chance to defend itself. [168] Payne JA noted further that:[169]

> "The appellant's submission that it "was a matter for the respondent to choose the grounds on which it defended the appellant's claim at trial" is correct, but further emphasises the prejudice arising from the

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162 Cf *Tapp* at [109].
163 *Tapp* at [113].
164 With whom Basten JA and Mc Callum J agreed on this point.
165 *Tapp* at [103] referring to the Commonwealth Consumer Affairs Advisory Council, Consumer Rights: Reforming Statutory Implied Conditions and Warranties (Final Report, October 2009).
166 *Tapp* at [101]. As to which see also *Castle v Perisher Blue Pty Limited* [2020] NSWSC 1652 at [213].
167 Special leave was denied by the High Court in this regard.
168 *Tapp* at [118].
169 *Tapp* at [118].

> way the case is being argued now. I would reject ground 6 of the notice of appeal."

[333] His Honour noted that the claim under s 60 of the ACL would have failed in any event given the fact no breach of duty was found.

[334] The present case is different from *Tapp* insofar as Dr James sought to raise the case properly under s 60 in final submissions as a standalone guarantee, whereas in *Tapp* the case continued to be framed in terms of an agreement which was not made out. That said, Dr James did not seek leave to amend the provision into conformity with the section.

[335] USM submitted that it was entitled to run its case on the basis of the case pleaded against it which given it was wrongly premised could not succeed. That is of course an unsurprising submission given the purpose of pleadings is to define a party's case, so the other side knows the case they have to meet. USM submitted it would be prejudicial to allow Dr James to pursue a case contrary to her pleading at completion of trial.

[336] In terms of prejudice, if Dr James were permitted to now simply abandon the reference to " implied within the agreement", USM stated it had run its case on a particular basis and that it was precluded from raising a defence that the guarantee would be excluded by operation of the waiver executed by Dr James.[170] By reference to the case of *Motorcycling Events Group Australia Pty Ltd v Kelly*[171] USM also contends that if the guarantee was an implied term, ss 9 and 10 of the CLA would not have been excluded. It further contends that Dr James should not be able to rely on s 60 of the ACL when the limitation period had now expired. That may be significant if Dr James seeks to raise new facts as part of its case not contained in the negligence action.[172]

Consideration

[337] I do not accept Dr James' submission that if the court simply adopted the approach of determining that as "implied within the agreement" is not a constituent ingredient for a cause of action based upon s 60 of the ACL[173], the court can then just carve it out as not proved but find that Dr James has otherwise proved the constituent ingredients and USM could not have been misled as to the case it had to meet. Those material facts required to establish a statutory guarantee were not however pleaded.

[338] I accept there may be prejudice suffered by USM in treating the FASOC as if it had properly pleaded a cause of action to claim relief under s 60 of the ACL. It was open to raise the waiver of liability as it was not excluded by the operation of s 64 of the ACL because the triathlon is arguably a contract for recreational services. The nature of the contract was not identified by USM although USM pleaded the fee was only for Dr James to participate in the GCT. The registration form contained the waiver.[174] Pursuant to s 139A of the CCA, a term of a contract for the supply of

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170 Exhibit 50.
171 (2013) 86 NSWLR 55.
172 UCPR r 376(4).
173 Unlike *Trade Practices Act* (Cth) s 74(1).
174 Exhibit 50.

recreational services is not void if, and to the extent that, it excludes the statutory guarantee in relation to death, physical or mental injury or disease.[175] "Recreational services" includes the provision of sporting pursuits that involve a significant degree of physical exertion.[176]

[339] While counsel for Dr James submitted that the waiver was just as applicable to a breach of duty, counsel for USM rightly pointed out that the waiver concerned was directed specifically to the ACL, not a common law breach of duty. I do not therefore accept Dr James' contention in this regard and accept that the waiver is directed to claim under the ACL which may have been raised by USM had the claim under s 60 been properly pleaded.

[340] However, the prejudice in that respect is limited given USM did engage with the pleading to allege that the ACL did not apply and in any event there was no breach of the guarantee.

[341] However, in addition to the failure to plead a proper cause of action under s 60 of the ACL, Dr James has further failed to articulate a claim for damages under the ACL at all. Notwithstanding a number of concessions being made by Dr James, it still claimed some damages under common law principles on the basis of s 267 of the ACL. However, the preconditions for claiming relief under s 267 also have not been pleaded.

[342] Section 60 is contained in Part 3-2 of the ACL. Section 137C(1) of the ACL therefore does not apply to exclude a claim for damages for personal injuries under s 236 of the ACL, since it only applies to breaches of Part 2-1 or Part 3-2 of the ACL. Section 267 of the ACL is contained in Division 1 Part 5-4 of the ACL. Curiously, s 87E in Part VIB of the CCA applies to claims for personal injury damages relating to Division 2 of Part 5-4, but not Division 1.

[343] Section 15 of the ACL provides that "conduct is not taken for the purposes of this Schedule, to contravene a provision of this Schedule merely because of the application of … (b) a provision of Division 1 of Part 3-2." That includes s 60 of the ACL.

[344] Section 267 of the ACL provides that:

> "**267 Action against suppliers of services**
>
> (1) A consumer may take action under this section if:
>
> (a) a person (the supplier) supplies, in trade or commerce, services to the consumer; and
>
> (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and

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175 Subject to s 139A(4) of the CCA which is not suggested to apply here.

176 CCA s 139A(2); Which Payne JA in *Tapp* considered was satisfied in relation to the campdraft event and that the payment of a fee for entry to the Association was sufficient as a hallmark of trade and commerce and the services supplied in trade or commerce; see *Tapp* at [120]-[123] and [125].

> (c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:
>
> (i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
>
> (ii) a cause independent of human control that occurred after the services were supplied.
>
> (2) If the failure to comply with the guarantee can be remedied and is not a major failure:
>
> (a) the consumer may require the supplier to remedy the failure within a reasonable time; or
>
> (b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time—the consumer may:
>
> (i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or
>
> (ii) terminate the contract for the supply of the services.
>
> (3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
>
> (a) terminate the contract for the supply of the services; or
>
> (b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.
>
> (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.
>
> (5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3)."

[345] In *Alameddine v Glenworth Valley Horse Riding Pty Ltd*,[177] McFarlane J[178] found there was a breach of s 60 of the ACL in relation to an instructor's instructions as to the use of quad bikes for recreational purposes. It was accepted damages were payable under s 267[179] and that the limitations in Part VIB of the CCA applied[180]. In

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177 (2015) 324 ALR 335 at [69], [77].
178 With whom Simpson JA and Campbell AJA agreed.
179 (2015) 324 ALR 335 at [59].
180 (2015) 324 ALR 335 at [71]–[72].

Let's Go Adventures v Barrett[181] Adamson J (with whom Basten JA and Gleeson JA agreed) considered the statutory cause of action was conferred by s 60 when read with s 267 of the ACL.[182] Justice Garling in *Rickhuss v Cosmetic Institute Pty Ltd (No 2)*[183] ("***Rickhuss***") considered that a pleading by which damages were claimed under, *inter alia*, s 236 of the ACL and rather relief could only be claimed under s 267 of the ACL.[184]

[346] Dr James stated that damages may be claimed under s 236 or s 267 of the ACL, although the position was unclear. In any event, Dr James submitted that little turns on whether damages are assessed either:[185]

> "…
>
> (a) subject to the CCA generally and Pt VIB in particular; or
>
> (b) subject to the Civil Liability Act 2003 ('the CLA') and the Civil Liability Regulation 2014 ('the CLR') in general and ss 54 to 62 inclusive of the former in particular; or
>
> (c) exclusively at common law…"

[347] That submission arises largely out of the concessions made by Dr James with respect to general damages and the payment of interest. However, Dr James maintained that some damages should be assessed in accordance with the common law for future and past economic loss.

[348] USM submits that damages cannot be properly sought under s 236 of the ACL and would have to be claimed under s 267 of the ACL. I consider that to be correct. Section 236 of the ACL applies to recovery of damages where a person has suffered loss or damage by conduct which contravenes Chapter 2 or Chapter 3 of the ACL. Section 15 of the ACL however provides that a contravention is not established merely because of the application of *inter alia* s 60 of the ACL. As was found by Garling J in *Rickhuss*, s 15 of the ACL has the substantive effect that where conduct results in a failure to comply with a consumer guarantee it is not taken thereby to contravene a provision of the ACL.[186] Thus, s 236 of the ACL would not apply. Section 267 of the ACL specifically sets out the right to take action for a failure to comply with a guarantee which cannot be remedied, and loss or damage if it was reasonably foreseeable the consumer would suffer such loss or damage as a result of the failure. It provides the basis for the claim for damages.

[349] Dr James did not seek to take action under s 267 of the ACL, nor has she pleaded her claim to demonstrate that the section is enlivened.

[350] In the circumstances, I am not satisfied Dr James has properly raised any action under s 60 of the ACL nor sought to claim damages for a breach of s 60 of the ACL under s 267 of the ACL, notwithstanding that the result is that Dr James does not

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181 [2017] NSWCA 243.
182 [2017] NSWCA 243 at [100],[163].
183 [2020] NSWSC 393.
184 [2020] NSWSC 393 at [62]
185 Plaintiff's outline of submissions regarding assessment of damages for breach of statutory guarantee at [9(a)-(c)].
186 *Rickhuss* at [63].

get the benefit of some of the defences under the CLA being excluded. While the concessions made by Dr James reduce any prejudice suffered by the FASOC failing to claim damages in accordance with s 267 ACL, given USM concedes that there does not appear to be any attempt by Dr James to seek damages beyond that limited by the CLA or claim gratuitous care, the failure to plead such damages further supports the fact that the FASOC did not properly disclose a cause of action for a breach of s 60 of the ACL.

[351] Given my finding that Dr James has not pleaded a cause of action and claim for damages under s 60 and s 267 of the ACL, I do not find the claim established. As the defences under the CLA will then apply and I must therefore consider the defences raised by USM under the CLA.

[352] As I have not found the defences to be established but have found a breach of duty, in the circumstances of the present case little turns on the failure to establish a cause of action under s 60 of the ACL other than in some minor respects with respect to damages.

Defences pursuant to s 13 and s 16 of the CLA

[353] USM relies upon ss 13 and 16 of the CLA, and alleges in its FAD as follows:

> "19. Further or alternatively, at all material times:
>
> (a) the plaintiff knew she was participating in a duathlon with able-bodied athletes and para-triathletes;
>
> (b) the plaintiff knew that able-bodied athletes and para-triathletes may be on a part of the course including that part where the incident occurred when they were in proximity to one another;
>
> (c) the plaintiff knew there was a risk that para-triathletes in racing wheelchairs may come into contact with able-bodied athletes in the course of conducting the race;
>
> (d) there existed a risk of a collision and a fall by an able-bodied athlete such as the plaintiff which was not insignificant;
>
> (e) the plaintiff knew there was a risk that if contact occurred between able-bodied athletes and/or an able-bodied athlete and a para-triathlete that the able-bodied athlete may trip and fall and/or suffer injury ('**the event**');
>
> (f) the plaintiff freely and voluntarily, with full knowledge of the nature and extent of risk, agreed by participating in the duathlon to accept the risk of the event occurring.
>
> 20. In the premises of the matters pleaded in paragraph 19 aforesaid:
>
> (a) the event of which the plaintiff was aware did occur;
>
> (b) the risk of the event occurring was an 'obvious risk' within the meaning of that term as used in section 13 of the *Civil Liability Act 2003* ('**CLA**'); and

> (c) the defendant relies upon the defence of voluntary assumption of risk by the plaintiff.
>
> 21. Further or in the alternative, given the risk that a para-athlete such as Chaffey may or could come into contact with an able-bodied athlete such as the plaintiff in the conduct of a duathlon were there were other competitors on the racecourse:
>
> (a) such risk was an 'obvious risk' within the meaning of that term as used in section 13 of the CLA ('**the risk**'); and
>
> (b) an 'inherent risk' within the meaning of that term as used in section 16 of the CLA."

[354] It is alleged that in the premises pleaded by USM:

(a) that Dr James is presumed to have been aware of the risk;

(b) there was no duty to warn Dr James of the risk when participating in the duathlon, either by way of an oral warning or the installation of signage when identifying the risk;

(c) the inherent risk was a risk which materialised in the course of the duathlon; and

(d) USM is not liable in negligence for any harm suffered by Dr James.

[355] An 'obvious risk' is a risk that in the circumstances would have been obvious to a reasonable person in the position of that person.[187] The risk may still be obvious even if it has a low probability of occurring.[188] It may also be an obvious risk even if the risk is not prominent, conspicuous or physically observable.[189] If it is an obvious risk, the person is taken to have become aware of the risk unless the plaintiff proves, on the balance of probabilities that he or she was not aware of the risk.[190] There is no duty owed to warn of an obvious risk to the plaintiff.[191]

[356] In *Collins v Clarence Valley Council*,[192] McColl JA (with whom Macfarlan and Emmett JJA agreed) considered that there was much to be said that the risk in question is the same as that identified for duty of care purposes, given if the defence is established, the defendant will not be found to have owed the plaintiff a duty of care. She stated that:[193]

> "Obvious" means that both "the factual scenario facing the plaintiff" and "the risk are apparent to and would be recognized by a reasonable [person], in the position of the [plaintiff], exercising ordinary perception, intelligence and judgment." That means the court will take into account, for example, the age and level of experience of the plaintiff. Whether or not a risk is "obvious" may well depend upon the extent to which the probability of its

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187 CLA s 13.
188 CLA s 13(3).
189 CLA s 13(4).
190 CLA s 14.
191 CLA s 15.
192 (2015) 91 NSWLR 128.
193 (2015) 91 NSWLR 128 at [138].

> occurrence is or is not readily apparent to the reasonable person in the position of the plaintiff. A risk may be "obvious" even though it has a low probability of occurring and is not prominent, conspicuous or physically observable.
>
> As I have said, prima facie, the plaintiff's actual knowledge of matters which constitute the risk of harm is irrelevant, except to the extent that how any such knowledge was acquired may be relevant to the forward looking inquiry as to whether the risk would have been obvious to a reasonable person in his or her position. However, as the "obvious risk" inquiry is into the knowledge that a reasonable person in the appellant's position should be taken to have had, it may be relevant to know the extent to which he or she was actually aware of the risk in whole or in part. That "would be a circumstance to be taken into account when considering what would have been obvious to a reasonable person in the position of the respondent."

[357] The risk is to be described with a level of generality, but sufficiently precise to capture the harm which resulted from the materialisation of the facts of the particular case.[194]

[358] In *The Thistle Company of Australia Ltd v Bretz & Anor*,[195] Philippides JA (with whom Gotterson JA and Bond J agreed) considered the question of whether a concrete plinth painted black on which a petrol bowser was positioned, which an elderly man tripped over was an obvious risk. Her Honour rejected the contention that the trial judge should have found the risk was an obvious risk and stated:[196]

> "…That question, the applicant contended, was to be determined by asking whether the risk would have been obvious to a reasonable person in Mr Bretz's position.
>
> Citing *State of Queensland v Kelly*, the applicant submitted that the judge's focus ought to have been on a reasonable person, in the position of Mr Bretz (including his experience of the area), exercising ordinary perception, intelligence and judgment. Senior counsel on behalf of Mr Bretz referred to a line of New South Wales authority concerning the analogues of s 13 and s 15, which was considered by this Court in *Kelly*, which concluded that while the test is "objective", "the plaintiff's evidence was relevant to what a reasonable person would know about the risk". Reference was also made to *Sharp v Parramatta City Council*, where it was held that the test for an "obvious risk" entailed identifying the particular risk which materialised and caused a plaintiff's injury and then enquiring, prospectively, whether such risk "would clearly have been apparent to and understood by a reasonable adult in the [plaintiff's] position".

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194 See *Singh v Lynch* (2020) 103 NSWLR 568 at [150] per Payne JA, citing *Menz v Wagga Wagga Show Society Inc* (2020) 103 NSWLR 103 at [70]-[74].

195 [2018] QCA 6.

196 [2018] QCA 6 at [15]-[17].

> In my view, the trial judge's reasoning was consistent with that approach. Her Honour's finding that the risk was not "obvious" to a reasonable person in the position of Mr Bretz, was made in the context of findings as to the shallow nature of the plinth's protrusion (some 37 to 39 millimetres) which extended beyond the body of the bowser, that it was an unusual feature of the site and that it had been painted black from its original colour of yellow, the same colour as the adjacent tarmac, resulting in a "colour homogeneity of the stepped levels". Her Honour concluded at [28] that, in those circumstances, the repainting "camouflaged" the plinth and, given Mr Bretz's limited experience of the site, the plinth was not an obvious risk "for him". The use of the words "for him" read in context does not indicate the introduction of an impermissible element of subjectivity into the test under s 13 of the Act."
>
> (footnotes omitted)

Obvious risk

[359] As to USM's contention that the risk of collision was an obvious risk, it contends that in analysing whether a risk is an "obvious risk" the court is to take into account the age and maturity of an athlete in assessing whether the risk would have been obvious to a reasonable person in the position of Dr James. It contends that:[197]

> "…The plaintiff is an intelligent and experienced competitor. She should have been well aware of the guidelines in respect of the conduct of triathlons. She also was (or should have been) aware para-triathletes in wheelchairs and hand cycles were on the course. The plaintiff knows that if she is running out in a position which is not to the left in circumstances where para-athletes (or any athletes) are seeking to pass at greater speed, there must exist a risk of a collision. She arguably is also aware of the risk of some type of collision if another athlete acts recklessly or even negligently."

[360] Dr James was an intelligent and fairly experienced competitor. She accepted that she was aware of the guidelines in respect of the conduct of a triathlon. However, USM's argument is premised on the proposition that she should, or a reasonable person in her position, would have known that para-athletes in wheelchairs and hand cycles were on the course. I do not find that proposition to be established.

[361] There was evidence that para-athletes in wheelchairs had competed in triathlons organised by USM. Ms Daamen gave evidence that:[198]

> "Now – okay, and - - -?---The age groupers and the para-triathletes usually compete together, even overseas. They may have different time schedules for different areas, but, yeah, it's all – everyone works together in triathlon."

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197 Defendant's submissions at [139].
198 T 4-69/15-17.

[362] Further when Ms Daamen was asked about whether it was commonplace to hear a para-athlete in a wheelchair coming she stated:[199]

> "And – and is that common or uncommon, or what's the situation?---It depends on the events and what times they start people off, but I have – have had it before, yes, and you just move to the left."

[363] There were no details as what the events were that Ms Daamen was speaking about, which was significant because she had competed in triathlons in Australia and overseas. In any event, her evidence does not go as high as supporting USM's submission that it was commonplace to have para-athletes on the course at the same time. The evidence supports the fact that able-bodied athletes and para-athletes had been on a course at the same time but does not suggest it was common for them to overlap at the same time. Ms Daamen did not say it was common, only that she had had it happen before. Similarly, while Ms Van Pooss stated that para-athletes were part of the overall wave starts, they were at the beginning of the wave starts. While evidence was given of one photo which identified a para-athlete in a wheelchair beside an able-bodied athlete in the 2017 Gold Coast triathlon,[200] that overlap was on the final leg of the run and triathlon. Ms Van Pooss stated that USM seek to minimise the time that able-bodied athletes and para-athletes are on the course at the same time. The evidence did not support the fact that it was commonplace that the para-athletes and able-bodied athletes were competing on the same part of the course at the same time.

[364] Dr James did not recall para-athletes in wheelchairs having competed in the events that she had been in before. I do not find that that was a falsehood as USM contends. There is no reference in USM's athletes guide or in the Rules to the prospect of the two groups running together.[201] Given the number of para-athletes in wheelchairs is not a large number and the different start times in the past with wave starts, Dr James' evidence that she had not seen a para-athlete in a wheelchair on the course with her before was credible and I accept that evidence.[202] To the extent she had given evidence that the year before para-athletes had competed in a separate event on the Saturday that was true. It was however a different event from the GCT. The evidence does not rise to a level to satisfy me that it is a matter which a reasonable person would necessarily have known. The fact that Ms Daamen was aware of the risk of a para-athlete coming from behind is not conclusive of a reasonable person in Dr James' position. Ms Daamen had accumulated her knowledge from not only competing in Australia but overseas.

[365] The course was also different from that which Dr James had been on before when competing in the previous triathlon. The fact that the duathlon created an unusual situation where para-athletes and able-bodied athletes were together on the course at the same time was also supported by Ms Groom's text in relation to the two categories of athletes. While the text can only be given limited weight, it does

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199 T4-70/25-27.

200 Exhibit 48. It is the same photo from multiple perspectives.

201 Save for rule 9.1 of the Rules, which in stating that "9.1 Rules for the conduct of paratriathlon events can be found in the ITU Competition Rules on the ITU website (www.triathlon.org)", appears to relate to a paratriathlon being conducted as a separate event: See Van Pooss Affidavit, Ex 1 pp 106-120.

202 It is consistent with her complaint, see Exhibit 5.

provide some independent support for the evidence of Dr James that she had not experienced being on the course at the same time with para-athletes.

[366] I therefore find that the risk of contact with a para-athlete in a wheelchair coming from behind at speed on a narrow bend of the course was not a risk that would have been obvious to a reasonable person.

[367] USM's defence that the risk of harm was an obvious risk therefore fails.

[368] I will therefore deal with some further contentions raised by Dr James very briefly.

[369] I accept that Dr James chose to participate in a triathlon and was aware that the competition involved some risk of injury.

[370] While I accept that there were obvious risks in the swimming leg when athletes could come into contact with each other as they seek to move through the water, or on the run leg where able-bodied athletes may come into contact and trip each other, or the cycling leg, but they have little relevance to the obviousness of a risk of harm from a para-athlete colliding with an able-bodied athlete. The risk of harm from a collision with a para-athlete in a wheelchair is a different risk which I have identified above and explained earlier in the judgment. The wheelchair is a solid structure which travels up to twice the speed of an athlete such as Dr James. To the extent that USM contends that the risk of competition is that people running at speed could come into contact with each other, that is to characterise the risk at too high a level of generality.

[371] USM also submits that Dr James knew that she was running out of position in accordance with the protocols adopted by athletes, which is not to the left. As set out above I have not found that Dr James was not running out of position, although given the way the field had progressed and her response to the yelling by Mr Chaffey, I have found that she likely stepped to the right into his pathway.

[372] Given the above circumstances, I do not find that a reasonable person in Dr James' position would have regarded the risk of collision with a para-athlete in a wheelchair obvious.[203]

Inherent risk

[373] USM also relies on s 16 of the CLA to contend that the risk of collision was an inherent risk and that it is not liable in negligence for harm suffered by another person, namely Dr James, as a result of the materialisation of what it contends is an inherent risk, that of collision between competitors.

[374] An inherent risk is one over which no party has control, despite the exercise of reasonable care. In the present case USM emphasises that there are inherent risks of collisions between athletes running or swimming or cycling, which Dr James accepted. However, given the evidence does not establish that it was commonplace for para-athletes and able-bodied athletes to be on the same part of the course at the same time, the risk of the collision in those circumstances is not an inherent risk of the event.

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[203] *The Thistle Company of Australia Pty Ltd v Bretz & Anor* [2018] QCA 6.

[375] In a sporting event there are of course inherent risks. However, it is not true to say that the risk of collision such as the present case could not have been avoided by the exercise of reasonable care and skill, notwithstanding the significant speed at which Mr Chaffey was challenging and seeking to overtake other athletes. Had Dr James and Mr Chaffey been separated at a point where there was an increased risk of collision due to a narrowing of the course and being 100 metres from the finishing line, it may safely be assumed that it is unlikely the incident would have occurred.

[376] I do not find that USM has established the risk of collision was an inherent risk.

Causation

[377] The onus is on Dr James to establish that the breach of duty caused the particular harm. As I have found that the ACL case has not been properly raised, I will consider whether causation has been established pursuant to s 11 of the CLA. The determination of factual causation is a statutory statement of the "but for" test of causation. Thus, the court must be satisfied that Dr James would not have suffered the particular harm "but for" USM's negligence. That requires that Dr James must prove that USM's breach of duty was a necessary condition of the occurrence of the particular harm. The court must also be satisfied that it is appropriate for the scope of liability of the person in breach (i.e., USM) to extend to the harm so caused.

[378] There is not any real dispute that the scope of liability would extend to the harm so caused.

[379] I have set out the circumstances in which I have found that the collision occurred above. It is uncontentious that Dr James fell as a result of Mr Chaffey colliding with her, in all likelihood with her right leg, causing her to spin and fall back as a result of which she has suffered personal injuries, the extent of which is in dispute.

[380] I have found a breach of duty has occurred due to the failure of USM to erect barriers to separate the para-athletes from the able-bodied athletes leading from the orange concrete path around the s-bend, as the parties entered Mitchell Park around the s-bend. I am satisfied that it is more probable than not that if the able-bodied athletes and the para-athletes in wheelchairs had been separated, Mr Chaffey, notwithstanding that he was travelling at significant speed, would not have been in the position of trying to overtake the able-bodied athletes and the harm would not have occurred. I consider that if there was a barrier with a clear direction as to which way para-athletes were to go and which path able-bodied athletes were to follow, it is likely that each category of athlete would have followed the direction. The breach of duty, namely the lack of separation of the athletes, was a necessary condition of the occurrence of harm to Dr James.

[381] I find causation is established.

Contributory negligence

[382] USM further raises that Dr James caused or contributed to her injuries by her own contributory negligence, insofar as it is alleged that Dr James failed to take precautions against the risk of the harm suffered.[204] In that regard the onus lies on

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[204] FAD at [16].

USM. Pursuant to s 23 of the CLA, the standard of care required of the person who has suffered harm is that of a reasonable person in the position of that person. It is to be determined on the basis of what the person knew or ought to reasonably have known at the time.

[383] According to USM, Dr James was running three abreast through an area where the width of the course was five to six metres. In doing so, it is said she failed to adhere to the basic requirements for her own safety and created an obstacle for other athletes who wished to pass.

[384] I am not satisfied that Dr James was one of the athletes described by Ms Daamen as running three abreast.

[385] While I am satisfied it is likely she was startled and stepped to the to the right rather than keeping to the left when Mr Chaffey called out contrary to the protocols, given it was a sudden response to Mr Chaffey's calling out where he was coming behind her at speed, it was a reaction in the moment and I do not find that a reasonable person in her position would have acted differently or had time to reasonably look behind to make a judgment as to how she should respond. I am therefore not satisfied that she failed to take reasonable care of her own safety. Contributory negligence is therefore not established.

Quantum

Medical Evidence

[386] As a result of the accident in the duathlon, Dr James is said to have suffered from:

(a) a injury said to be PTSD;

(b) a closed head injury;

(c) a cervical spine injury;

(d) chronic ongoing headaches;

(e) nuchal vertigo;

(f) tinnitus;

(g) a lumbar spine injury;

(h) chronic capsule ligamentous injury to her left shoulder girdle; and

(i) bruising and abrasions.

[387] It is alleged that the injuries were caused by USM's breach of duty in that:

(a) the breach of duty was a necessary condition of the harm suffered by Dr James; and

(b) it is appropriate for the scope of liability for USM to extend to the harm suffered by Dr James.

[388] According to USM, any injuries suffered by Dr James as a consequence of the incident are relatively mild and significantly less severe than the alleged closed head

injury, cervical spine injury and the consequences thereof.[205] The real dispute in the medical evidence lies in whether Dr James suffered a mild TBI and/or suffers from PTSD or anxiety. USM submits that the court should only find a psychological injury based on the diagnosis of Professor Whiteford.

[389] A number of medical witnesses were called by each side.

[390] Three neurologists were called. Dr Tomlinson and Dr Tsang on behalf of Dr James and Dr Atkinson on behalf of USM. Dr Tsang was not called as an independent expert but had treated Dr James for chronic headaches. Dr Georgius, a neuropsychologist, had assessed Dr James on two occasions and also gave evidence.

[391] Psychiatrists Dr Bell and Professor Whiteford both also gave evidence. Dr Cash, Dr James' treating psychiatrist was not called to give evidence. USM contend that the court should draw an inference that his evidence would not have been of assistance to Dr James, where the particular circumstances of the condition and prospects of improvement are under consideration. I will consider that further below.

[392] USM again raised Dr James' credibility in relation to the symptoms she described to the medical practitioners, suggesting they were contrived, particularly due to her memory of some things prior to the accident being unaffected and after the accident being spasmodic, which it contended was particularly the case when she was avoiding answering questions. USM suggested that she was, as a trained clinical psychologist, aware of the criteria or indicia which may influence the diagnosis of a practitioner who would be expected to take Dr James at face value and implicitly sought to manipulate the symptoms she described. The diagnoses of Dr James did largely depend on her description of symptoms to the doctors with little by way of objectively verifiable evidence such as MRIs showing some brain damage. That was a significant issue for Dr Atkinson in his assessment.

[393] I have considered the evidence carefully. While I do consider that there was some exaggeration by Dr James, in particular by reference to having a TBI, I do not consider that was the result of manipulation by her. Rather, as evidenced in her reports to Dr Georgius she had high anxiety about a TBI notwithstanding the reassurances by Dr Georgius that she had no cognitive impairment. I consider that it is likely that over time she has become increasingly stressed by the fact she has a brain injury and has not recovered.[206]

[394] Dr James had no difficulty in recalling her life history prior to the accident but could recall very little of what happened after the incident in relation to the rest of the race, notwithstanding that she drove home that night. Her memory of other matters following the incident are patchy. While she of course is invested in this litigation and its outcome, what militates against the view that her symptoms were contrived is that she saw a number of medical practitioners including Dr Georgius and Dr Tsang as part of the treatment for her condition, and not for the provision of medico-legal reports for this proceeding. Dr James' description of her symptomology in evidence was for the most part generally consistent with what was described to those doctors providing medico-legal reports, which would also militate against the suggestion that she was describing symptoms to extract a

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[205] FAD at [10].

[206] I accept Professor Whiteford's view in this regard

particular diagnosis. She engaged in a PTSD program to recover from the PTSD. In 2020, Dr Gerogius described Dr James as having treatment fatigue and sought to encourage her to continue medical treatment as well as take care of her health and overall wellbeing. She was not challenged that her memory difficulties did not exist nor that they did not arise out of her injuries. She has lost her job and rental accommodation as a result of the incident and is bankrupt with two young children. It is unlikely that was all part of a grand plan to improve her position in this litigation. She had complained of the symptoms prior to the litigation, giving up work and bankruptcy. I consider it is unlikely that Dr James has engaged in what would be significant fraud to further her position in this litigation.

[395] While USM submits that Dr James generally lacked credibility, no actual challenge was made of her description of symptoms to the doctors, or that she had sought to describe them to elicit a certain diagnosis.

[396] Further issues arise for consideration as a result of the work done for the O family which was commented upon by Dr Bell and Professor Whiteford as raising issues in relation to the full extent of her incapacity and timing.

Dr Tomlinson

[397] Dr Tomlinson saw Dr James in February 2019 and in March 2021.

[398] Dr Tomlinson provided two reports.[207] Although Dr Tomlinson's expertise was neurology, Dr Tomlinson expressed opinions about matters outside his expertise in relation to disequilibrium, tinnitus and shoulder girdle. I do not consider that arose out of his being an advocate for Dr Tomlinson. He was very candid in his evidence that while he expressed opinions about matters beyond his expertise in neurology, it was on the basis he considered other opinions would be sought by those with proper expertise. In cross-examination, Dr Tomlinson said he was not asked to express an opinion about anything in particular so he provided his "impression" about what he thought was going on.[208] Dr Tomlinson accepted that in relation to those matters outside his expertise that Dr James would need to go to an expert in the area for a proper diagnosis.

[399] While he assessed a whole person impairment ("**WPI**") in relation to Dr James' mental state as 10 per cent, he agreed that was a matter for other experts to assess in their particular area. In that regard, he stated she should go and see a neuropsychologist or a psychiatrist for a proper assessment rather than relying on his particular views.[209]

[400] Similarly, while he gave assessments of WPIs for disequilibrium, tinnitus and a shoulder injury, Dr Tomlinson frankly conceded that he considered that for a proper assessment of disequilibrium, Dr James needed to see an 'ENT specialist,' as was the case with her symptoms of tinnitus. In relation to the shoulder injury, he considered there was an overlap of specialties but, that she would need to be assessed by a shoulder specialist before he would consider it was a matter requiring an operation on the cervical spine.

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207 Exhibit 23; Exhibit 24.
208 T3-30.
209 T3-32/16-22.

[401] I accept Dr Tomlinson's evidence that as a neurologist he was however qualified to provide an opinion as to Dr James' head injuries and spinal injuries. That was supported by Dr Atkinson, the neurosurgeon called on behalf of USM.[210]

[402] Dr Tomlinson gave evidence that Dr James sustained a closed head injury, and that her symptoms would be consistent with the injury she sustained. He noted she had post-traumatic amnesia and considered her symptoms were consistent with the injury sustained. However, his assessment of impairment took into account matters as to mental status which he considered were matters for assessment by a neuropsychologist. Dr Georgius also found that Dr James had a mild TBI but found no cognitive impairment. Inexplicably, that report does not seem to have been sent to Dr Tomlinson.

[403] He also considered she suffered a whiplash-type injury to her cervical spine. He considered it was late whiplash syndrome which occurs in 20 to 40 per cent of cases. He also considered she had chronic muscular contraction headaches and a soft tissue injury to her lumbar spine.

[404] In his latest report in relation to the closed head injury Dr Tomlinson assessed Dr James as having a 10 per cent WPI. That was affected by the same ills as set out above. Dr Tomlinson agreed took into account various reports made to other doctors and which he agreed were matters for assessment by a neuropsychologist. As such I can give his assessment of impairment little weight.

[405] He considered her symptoms of the whiplash injury had stabilised and assessed her as having a seven per cent whole body impairment. He considered that her chronic muscular contraction headaches are an additional three per cent whole impairment. He considered the soft tissue injury in relation to her lumbar spine, which he estimated was a six per cent WPI.

Dr Atkinson

[406] Dr Atkinson has expertise as a neurosurgeon and also as a pain medical specialist. He saw Dr James in August 2019 and provided a report.[211]

[407] Dr Atkinson considered that Dr James exaggerated her presentation insofar as emotionally she appeared to be hypervigilant. Notwithstanding that, he also commented she was alert and cooperative.

[408] He considered that Dr James had a zero per cent WPI in respect of her cervical and lumbar spine, with no additional impairment for the burden of pain. Similarly, he considered that with respect to the minor closed head injury she had zero per cent WPI. He found that there was no evidence of any organic brain injury, particularly relying on the fact that she had some recollection of events which he would not expect her to have if she had suffered a brain injury. She also had a normal test in the cognitive assessment, no neurological abnormalities in his examination and that the MRI of Dr James' brain was normal. He could find no impairment of the cervical or lumbar spine. He considered that it was probable that any pain suffered

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210 T3-36.
211 Exhibit 29.

from soft tissue injuries to the cervical spine, the left shoulder or the lumbar spine region would have settled within three to six months.

[409] Dr Atkinson considered that Dr James suffered a minor closed head injury, a mild musculoligamentous injury to the cervical spine and a soft tissue injury to the left shoulder

[410] In his report Dr Atkinson considered the report of clinical neuropsychologist Dr Georgius dated 31 July 2018, to which he stated he gave weight. Dr Atkinson referred to Dr Georgius' report in relation to her assessment of Dr James' general intellectual functioning, testing on verbal skills, cognitive speed, orientation and attention, all of which were within average range. He also noted Dr Georgius' assessment of Dr James memory index and memory skills, and her conclusion that there was evidence of depression, anxiety and PTSD.

[411] However, in cross-examination he stated that he disagreed with Dr Georgius' view that Dr James suffered a very brief loss of consciousness and mild post-traumatic amnesia which were indicative of Dr James suffering a mild TBI. He had no explanation as to why that was not included in a report. As to his rejection of her views in this respect, he stated that Dr James had not told him that she was knocked unconscious. In re-examination however he stated that she told him she was knocked unconscious momentarily. He further stated she did not fall to the ground, a statement he had to later resile from when it was pointed out she had told him that she had fallen backwards and hit her head. Dr Atkinson pointed to Dr James having no post retrograde amnesia which was inconsistent with such an injury. In particular, he stated Dr James could recall she was angry that Mr Chaffey was assisted in getting back into the wheelchair and could recall details of Mr Chaffey going through the air and swearing at her, as well as the fact she was able to drive home after the event, which were inconsistent with a TBI.

[412] Dr Atkinson did not identify any objective anatomical abnormalities in the cervical or lumbar spine, nor any objective or clinical abnormalities in respect of the reported brain injury. He considered the opinion of the psychiatrist was otherwise required although he did venture an opinion as a rehabilitation physician and pain medicine specialist, that it was unlikely that Dr James would recover fully until the stress of litigation was concluded. His assessment of Dr James was that PTSD, her anxiety and depression were the predominant issues in relation to her ability to carry out employment.

[413] Dr Atkinson noted the treatment received by Dr James since the incident from various medical practitioners and stated that the treatment was reasonable but did not consider further treatment was required subject to her being assessed by a psychiatrist.

[414] In re-examination, Dr Atkinson was asked about the fact that Dr James had allegedly forgotten about her having seen the three O children, and suddenly remembering it. In commenting upon that aspect, he noted that she was a highly intelligent, qualified psychologist, "she's a little bit of an expert in navigating the system"[212] and she was a vulnerable woman with a lot going on and she has really

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212 T3-41/1-2.

taken on the 'sick role' "because of all this and this perceived injustice".[213] Those opinions were not evident in Dr Atkinson's report, although he had commented her emotional hypervigilance suggested over-presentation. Given that, and that the framing of the questioning by USM's counsel included the statement that "My focus is on the concept of suddenly remembering it and that, otherwise it'd been forgotten about because of her condition,"[214] which was not an accurate summation of Dr James' evidence, I do not attach great significance to Dr Atkinson's comments. I find that the comments reflect personal judgments of Dr James without a proper factual foundation rather than an objective impartial view.

Dr Tsang

[415] Neurologist Dr Tsang also gave evidence which was contained in two reports.[215] He saw Dr James in relation to headaches she was suffering. He diagnosed Dr James with a post-concussion syndrome with chronic migraine without aura and convergence insufficiency. He noted vestibular symptoms were likely related to chronic migraine post-concussively, as were many other symptoms such as insomnia and effective disorder worsening. He noted she also had disabling psychiatric co-morbidities of PTSD.

[416] The MRI report obtained by him did not indicate any brain injury. Dr Tsang took a different view to Dr Atkinson in terms of the lack of evidence of an organic brain injury where there was nothing shown on an MRI. In his view, most closed head injuries will have no abnormal findings. In his view current technology was not advanced enough to detect microscopic damage to the brain itself.

[417] Dr Tsang's opinion remained the same in a follow up opinion of 7 September 2020, although he had noted that Dr James had reported improvements in her headaches having been placed on a drug, Allegron. Dr Tsang noted that while he referred to Dr James' condition as a post-concussion syndrome, others referred to it as a mild TBI. He considered that she fell somewhere between post-concussion syndrome to mild TBI, and that post head injury condition could lead to multiple symptoms including headaches, dizziness/vertigo, sleep wake cycle problems, psychiatric/mood, cognitive, physiological and autonomic symptoms. Dr James has complained she suffers a number of those symptoms. Dr Tsang found that the headache and dizziness/vertigo symptoms were improving, but that she still appeared to have significant psychiatric symptoms in the form of PTSD. He considered that it was post-traumatic psychiatric/psychological symptoms that were disabling Dr James the most.

[418] Dr Tsang did not express any concerns about the veracity of what he was told by Dr James and appeared sympathetic towards her. Dr Tsang commented that what Dr James told to him was consistent with what she had told Professor Whiteford.

[419] Dr Tsang was of the view that Dr James had been quite consistent with the report of events that occurred on the day of the triathlon, and what she told him was consistent with the mechanism and impact that he would deem reasonably significant to establish there was a mild TBI. Dr Tsang considered her patchy recall

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213 T3-41/4-5.
214 T3-40/45-47.
215 Exhibit 27 and 28.

of the incident was consistent with her suffering a minor brain injury and symptoms could persist even though the injury was mild. That view was supported by Dr Georgius. He accepted that the field of post-concussion syndrome was relatively new. He stated that in current medical literature there was increasing support for patients having a higher chance of developing PTSD after a brain injury of the type he identified, than otherwise.

[420] Dr Tsang was candid about the fact that post-concussive syndrome arising out of a mild TBI was a relatively new area of learning, however it is an area in relation to which he evidently had considerable knowledge and he was in touch with the scientific developments and present thinking in relation to post-concussive syndrome.

[421] Dr Tsang had noted considerable improvement in Dr James from the first time that he had seen her. He considered that her symptoms could well improve upon the ceasing of litigation, an adverse prognostic factor in a patient who has persistent post-traumatic headache and/or vestibular symptoms. He agreed however, that it was not always the case that people would improve.

[422] Dr Tsang gave well-reasoned and cogent answers in cross-examination where he was careful not to overstate his views, commenting that the true pathophysiology of the condition is not fully understood, and that there were a lot of clinical similarities with migraines. He did not provide an expert report assuming her injuries and any impairment assessment. His evidence was of relevance insofar as it appeared to give some support to the fact that Dr James displayed symptoms which he has diagnosed post-concussion syndrome which were consistent with a mild TBI. He considered however, that her psychiatric/psychological symptoms were disabling her the most.

Dr Georgius

[423] Dr James saw Dr Georgius some five months after the incident on 31 July 2018 and again on 10 September 2020. She is a clinical neuropsychologist. Dr James was referred to Dr Georgius by Dr Cash. Dr Georgius was an impressive and articulate witness who was clearly experienced in her area. When she saw Dr James in July 2018, she carried out extensive testing in making her assessment. She concluded that Dr James had suffered a significant mild TBI. That was consistent with Dr James losing consciousness for a few seconds and eventually continuing with the race but having patchy memories of the day after the accident, although she could recall events preceding the accident.

[424] Dr Georgius noted that Dr James had mood symptoms related to a specific triggering traumatic event, namely, the triathlon event, and that her symptoms had persisted for more than a month and were consistent with PTSD.

[425] Dr Georgius considered that the clinically significant elevation in Dr James' mood symptoms and the evidence of depression, anxiety and PTSD[216] were of concern. At that time, Dr Georgius expressed the opinion that Dr James' PTSD, as well as her grief and loss were intrusive, and that Dr James would require ongoing psychological treatment to ameliorate her symptoms. She had stated that without successful treatment of her symptoms, Dr James was at risk of developing a major

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[216] By Dr Cash.

depressive disorder and that untreated or persistent psychological difficulties such as PTSD, depression and anxiety provide significant barriers to long-term vocational and social success.[217]

[426] Dr Georgius found that there was no evidence of objective cognitive impairment and that whilst her mood symptoms remained intrusive, they would impact on her thinking skills and create the impression of cognitive difficulties. Dr Georgius indicated that most cognitive functioning recovery occurs by six to 12 months in mild TBI, with no long-term cognitive sequelae. She therefore considered Dr James had a good prognosis assuming effective psychological treatment was completed.

[427] Dr James undertook a PTSD program at Buderim Private Hospital from December 2018 without success.

[428] Dr James was referred to Dr Georgius again in 2020 by her GP. At that time Dr James presented to Dr Georgius with considerable frustration and overwhelmed as well as some confusion regarding her diagnoses in relation to the accident. She also was in the midst of this litigation. Dr Georgius stated that:

> "I reiterated to Dr. James that based on my assessment in July 2018, her primary diagnosis is a mild TBI (TBI), as she reported symptoms to me indicative that she suffered a very brief loss of consciousness and mild posttraumatic amnesia (PTA) in the accident. The diagnostic criteria are detailed in my original report, which I have attached for comprehensiveness. Associated with the mild TBI are her vestibular symptoms, chronic pain and Posttraumatic Stress Disorder (PTSD). Despite undergoing extensive treatment, my clinical impression today was that Dr. James' PTSD symptoms, as well as her grief and loss remain overwhelming, intrusive and disabling for her. As her PTSD symptoms appear to be resistant to treatment, they pose significant barriers to her social and vocational functioning, particularly when combined with her vestibular symptoms and chronic pain. Although Dr. James appears to be currently experiencing intervention/therapy 'fatigue', I encouraged her to continue with her various medical treatments as well as evidence-based lifestyle interventions including meditation, exercise, nature walks, healthy nutrition and adequate sleep. I also recommended journaling as an evidence-based option to deal with her overwhelm and anxiety. I am hopeful that once the litigation process is complete, Dr James will reinvent a valued and meaningful role for herself and that her suffering will ease."[218]

[429] Dr Georgius was an articulate witness, well versed in her field and had a well-reasoned basis for the conclusions that she reached. I accept her evidence. She did not consider that Dr James exaggerated her presentation when she saw her, and stated she was alert to people exaggerating symptoms and that she used different techniques to test the consistency of what she was being told when seeing patients.

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217 Exhibit 25 page 5.
218 Exhibit 26.

[430] Dr Georgius did not consider that Dr James' patchy memory after the events but detailed memory of the day before the incident was inconsistent with her clinical assessment. She stated that the fact that Dr James could not remember what actually happened at the time of the accident and in particular, could not remember if she lost consciousness was consistent with what people with mild TBIs experience because of the shock at the time of the accident. Her evidence in that regard was:

> "When she spoke to me and I took the assessment, when I was taking the history, she had what we call patchy recall for the day afterwards. She had some memories. She had, you know, mostly clear memories. She couldn't remember some things. That is very typical. This is – and is also very typical for people to not recall what actually happened. I – I constantly have people saying to me, "I can't even remember if I lost consciousness." So that is – and that – those were, pretty much, her words. So, to me, that is quite consistent with what people with mild traumatic brain injuries experience because of the shock of the actual – at the time of the accident, you know. It's – it's – it's – they – it's, sort of, a shocking event, and it all, sort of, happens so quickly that it's very difficult for them to, sort of, piece it all together. So - - -?---Yes. It is consistent with what I – my clinical practice – what I see. I think you said it was consistent?---It is consistent. Yes."[219]
>
> (emphasis added)

[431] Dr Georgius considered Dr James had a fairly classic mild TBI case with an overlay of PTSD.

[432] Dr Georgius did not consider it could be assumed that after the stress of litigation was removed that the PTSD would necessarily resolve. She stated Dr James had quite profound symptoms of PTSD which can persist.

[433] Dr Georgius did not consider that Dr James had an identified perceived injustice, which was referred to by Dr Atkinson. From what Dr James described to her, Dr James was very concerned with the safety of the event and had concern for future events and athletes, rather than being angry at not being compensated for the incident that occurred.

[434] Dr Georgius considered that it was unlikely that Dr James would be able to return to work as a psychologist given her persistent symptoms of PTSD. She considered that with intrusive symptoms it would be very difficult for her to manage any clinical work. She considered Dr James may have difficulty in being able to carry out an administrative role in the future, as she had found that people like Dr James who are highly trained can exacerbate their emotional dysfunction by return to what they regarded menial work. She stated that significant psychiatric conditions result in motivation being lost, thus inhibiting their return to work. She could not see any reason why Dr James would not be able to work as a personal trainer from a cognitive perspective. Dr Georgius' understanding was that Dr James had received proper treatment for the PTSD which had not been successful. She found her

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219 T3-12/28-42.

presentation in 2020 to be similar to that in 2018, but noted that Dr James was stressed by the fact that she had not improved and was very much struggling.

Brain injuries

[435] I am satisfied on the balance of probabilities that Dr James' suffered a mild TBI with no cognitive impairment. While the opinions of the neurologists Dr Tomlinson and Dr Atkinson differed markedly, Dr Tomlinson's views were supported by Dr Georgius' assessment and also Dr Tsang's view that Dr James' presentation was consistent with someone with post-concussion syndrome or a mild TBI.

[436] Unlike Dr Atkinson, Dr Tsang did not consider the lack of evidence of any brain injury on the MRI and patchy recall rather than a continuous amnesia were consistent with Dr James suffering from a mild TBI. As set out above, Dr Georgius considered Dr James' mild traumatic post-amnesia after the incident was consistent with her suffering a mild TBI. Dr Tomlinson also considered the post-traumatic amnesia to be consistent with a closed brain injury.

[437] I am satisfied that Dr James suffered a mild TBI as a result of hitting the back of her head after she fell after having been clipped on the leg from behind. Dr James did not give evidence she lost consciousness when she fell but described an out-of-body experience. She had however informed other doctors that she had lost consciousness momentarily. It is likely that when she hit her head, she momentarily lost consciousness, although she has no clear recollection that this was the case. Dr James could however remember having a sore head three days later, and the photographic evidence showing her on her back straight after the incident is consistent with her having hit the back of her head.

[438] The fact Dr James suffered a mild TBI was supported by Dr Tomlinson, Dr Tsang and Dr Georgius. While Dr Tsang and Dr Georgius were not independent medical experts, they both provided cogent evidence in support of Dr James having suffered a TBI. In particular, Dr Georgius carried out a detailed assessment to determine whether Dr James had suffered a brain injury. Professor Whiteford had raised the need for a further assessment in relation to the suffering of a mild TBI, as had Dr Bell, by a neuropsychologist. Dr Atkinson gave weight to Dr Georgius' report other than the reference to Dr James suffering a TBI. While Dr Atkinson did not consider Dr James could have suffered a TBI when the MRI showed no organic head injury, that was refuted by Dr Tsang and by the opinions of Dr Tomlinson. Similarly, Dr James' post incident amnesia and patchy recall was considered by Dr Tomlinson and Dr Georgius to be consistent with a TBI, a view which was supported by Dr Tsang.

[439] Other than the fact that Dr Atkinson considered it significant that Dr James drove home after the race there is no evidence that the fact that Dr James finished the race and sought out other competitors after the race were matters of medical significance raising questions as to the diagnoses. Nor was it a matter pursued in cross-examination. It is not a matter to which I attribute any weight.

[440] I find that Dr James suffered a TBI but consistent with Dr Georgius' assessment it is a mild TBI with post traumatic amnesia, and no cognitive impairment. The principal source of Dr James' cognitive difficulties and associated symptoms appears to arise from her psychological condition.

Psychiatric evidence

[441] Evidence was provided by two psychiatrists, namely, Dr Bell and Professor Whiteford. Both witnesses were impressive and gave well-reasoned opinions. Both were prepared to make appropriate concessions and were careful in the opinions that they expressed. The principal point of difference between the two is that Dr Bell diagnosed Dr James as suffering from PTSD, whereas Professor Whiteford considered that it was more likely that her condition arose out of anxiety.

Dr Bell

[442] Dr Bell saw Dr James in February 2019. Dr Bell considered that the significant depressive symptomology that Dr James displayed was a component of her PTSD. He considered her psychiatric condition was consistent with the circumstances of the accident, the physical injuries sustained, and their aftermath. Dr Bell considered Dr James would be severely restricted from continuing to work as a psychologist and that her incapacity to work was likely to be total and permanent. He assessed her permanent impairment as generally mild in relation to the categories of self-care and personal hygiene, social and recreational activities, travel, and concentration persistence and pace but moderate impairment based on social functioning and employability and adaptability. Based on those parameters he assessed her permanent psychiatric impairment to be seven per cent.

[443] Dr Bell rejected the proposition that his diagnosis was just based on what he was told by Dr James, noting that the current mental state examination was based on his objective observations, and stated that the opinion that Dr James suffered PTSD was entirely his opinion.

[444] It was not suggested to Dr Bell that Dr James did not satisfy the diagnostic criteria for PTSD.

[445] Dr Bell was surprised at the fact that Dr James produced the three reports in relation to the O children at the end of 2018. He considered that her suffering trauma in February 2018 would not necessarily have manifested itself quickly such that she could not continue work in that capacity, noting that it could have worsened gradually over the months following the accident. He considered Dr James got gradually worse over 2018. That is given some support by Dr Georgius' observations of Dr James' presentation in July 2018, at which time Dr Georgius was most concerned that Dr James get treatment for PTSD to avoid long term effects.

[446] Dr Bell considered that given that Dr James provided reports in December 2018, it would indicate that she had a type of capability to perform work after she was said to have closed her practice. That was contrary to what had been stated in the Statement of Future Loss and Damage and what she had told him. He was however hesitant to give any conclusive view in relation to how the production of the reports bore on Dr James' capacity, noting that there could be a number of explanations as to how she would have provided such a report, including that she needed the money or was medically obliged to do so and could not get her clients into an alternative psychologist at that time of year. The latter was supported by Dr James' explanation

that the reports had to be provided to the GP at the end of the sessions as part of a mental health plan package.[220]

Professor Whiteford

[447] Professor Whiteford saw Dr James in September 2019. He considered that Dr James suffered from an unspecified anxiety disorder.

[448] In his report,[221] Professor Whiteford stated that the mental state examination he carried out revealed clinically significant anxiety and cognitive difficulties. He concluded the psychiatric diagnosis was unclear. He stated there was a divergence of specialist medical opinion as to whether Dr James had suffered a TBI and agreed with Dr Bell that re-examination by a clinical neuropsychologist was required. Professor Whiteford was unable to confirm that Dr James' symptoms constituted PTSD. He considered the dominant symptom was anxiety and the DSM-5 diagnosis he made was of an unspecified anxiety disorder. The differing diagnoses were significant in terms of Dr James' long term recovery insofar as it could be expected she would recover if the source of anxiety could be removed.

[449] Professor Whiteford considered that litigation contributed significantly to Dr James' symptoms. He considered that Dr James' condition was not stable at that time and until a diagnosis was clear he could not estimate the extent to which Dr James' psychiatric impairment would be reduced by further treatment.

[450] Professor Whiteford assessed Dr James' psychiatric impairment rating scale as seven per cent. The only point upon which he differed from Dr Bell was in relation to self-care and personal hygiene, which he considered was 'class 1'.

[451] Professor Whiteford agreed that cognitive difficulties could be manifestations of a TBI or a psychiatric disorder. He was confident in his opinion that Dr James had displayed cognitive difficulties.

[452] Surprisingly, Professor Whiteford was not provided with Dr Georgius' 2020 short report, notwithstanding that he had stated that such a further report was necessary. After her short report was read to Professor Whiteford, he noted the view that the TBI's contribution to the cognitive difficulties was of a mild nature, which indicated that the anxiety disorder which had been diagnosed by others as PTSD was making a contribution, which was the balance of the difficulties with cognitive impairment. He stated that if the TBI component was mild it would be making a lesser contribution and the balance therefore must be, in the absence of something else, Dr James' anxiety. He stated that in his opinion, as a result of Dr Georgius' further report, the TBI is mild, it would be making less than a 50 per cent contribution to Dr James' cognitive difficulties and the balance would be attributable to her anxiety unless there was something he did not know about.

[453] Professor Whiteford stated that he had difficulty with the diagnosis of PTSD because he did not consider there was an event of trauma in 'criterion A' of the DM-4 or DSM-5. He did not consider seeing Dr James being hit from behind by a para-athlete travelling at speed would be an event that would be likely to cause

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220 T2-96.

221 Exhibit 32.

injury within the criteria A of the DM-4 or DSM-5, because Dr James did not realise that had happened. He stated it was only when she later saw media reports of what had happened that she had realised what occurred, and she was more worried about the gentleman in the wheelchair than herself.[222] In relation to the fact that PTSD could be diagnosed where persons are exposed to death or serious injury of others in DSM-5, he did not think that her seeing Mr Chaffey ricochet out of his chair and crash into the barrier would be traumatic because he continued with the race which led him to believe he was not seriously injured.

[454] Professor Whiteford stated that the treatment for the unspecified anxiety disorder would be different from PTSD, because you needed to focus on what was causing the anxiety disorder and seek to remove it or focus therapeutic attention on that. He stated that he had a concern when he saw Dr James about her deterioration in cognitive functioning which was making her more anxious and distressed, but the causality could go the other way (i.e., she had cognitive difficulties because she was anxious).

[455] Professor Whiteford agreed that the fact that Dr James had not improved when Dr Georgius saw her again some 26 months later, indicated that there was a factor present causative of anxiety and that unless it can be removed, the anxiety disorder may persist for the foreseeable future. Professor Whiteford considered that one of the stressors for the unspecified anxiety disorder would be the litigation itself, and that her anxiety would decrease when the litigation was completed. That anxiety could be attributed to a perceived brain injury by Dr James. Professor Whiteford considered the fact that Dr James was a clinical psychologist who would need cognitive functioning for her work indicated that a perceived brain injury would be a significant stressor to her.

[456] Professor Whiteford did consider that the fact that Dr James had written the reports on the three O children in December 2018 did alter his opinion, because the level of skill and clinical capacity demonstrated in the reports was greater than he understood Dr James had at the end of 2018. He considered the cognitive impairment Dr James was describing would have prevented her from being able to prepare reports at that detail and obviously more than one report on the same day. He considered that would have raised a question as to whether there was greater preservation of her cognitive capacity since March 2018, and there had not been the deterioration by December 2018 that he understood. In particular, because the reports were all dated 30 December 2018, he stated that:[223]

> "That the level of skill and clinical capacity demonstrated in the reports was greater than I understood Dr James had at the end of 2018.
>
> In what respect was it of a greater skill level, so to speak?---Well, the – specifically, the cognitive impairment that she was describing on impaired concentration, ability to organise her thoughts, difficulty sequencing, would – I would have thought had – prevented her from being able to prepare reports of this detail and certainly, obviously, more than one report on the same day."

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222 This is consistent with Dr Georgius' observation and does not suggest that Dr James was feeling she was the victim of injustice.

223 T3-95/17-30.

(emphasis added)

[457] Other than the date of the report being common to all three reports, the evidence did not indicate whether or not they were produced on one day. Dr James' last appointment with each of the O children was in November 2018. Dr James was also engaged in the PTSD program at Buderim from December 2018. Dr James' evidence was she cannot recall writing the reports.

Failure to call Dr Cash

[458] USM seek an inference to be drawn as a result of the failure by Dr James to call Dr Cash. He was on Dr James' witness list and no reason was deposed to as to why he could not be called. Given he is on Dr James' witness list, one could infer he was in Dr James' camp. USM contends an inference should be drawn as a result of that failure, however the contention lacks any precision as to what inference should be drawn. According to the medical reports, Dr Cash diagnosed Dr James with PTSD following the February incident and referred her to Dr Georgius for assessment. Dr Cash was Dr James' treating psychiatrist. A psychiatrist was called on behalf of Dr James to give an opinion as to her psychiatric state. Notwithstanding the conflict between Dr Bell and Professor Whiteford, there is no gap in the evidence as a result of failing to call her treating psychiatrist in this case that would be a basis for drawing any inference at all.[224] However, one would have expected that if he was to give evidence favourable to Dr James' case, he would have been called given the two opposing views of the psychiatrists.

[459] Dr James contends that if the court were to draw any inference based on the principles of *Blatch v Archer*, [225]it would only be open to draw an inference that the evidence of Dr Cash may not necessarily be helpful to her, but the court could not draw an inference that the evidence would have been harmful. There is a hesitation to call treating psychiatrists due to the potential effect that can have on the doctor and patient relationship. However, Dr Cash was on Dr James' witness list and no reason was submitted by Dr James as to why he was not called. I accept Dr James' submission that the inference to be drawn due to a failure to call Dr Cash, is an inference that he would not have assisted Dr James' case, but not that I should draw an inference unfavourable to Dr James.[226]

Determination - psychiatric evidence

[460] While Professor Whiteford considered the O reports caused him to question the level of cognitive deterioration suffered by Dr James, he did not state it would cause him to change his view that he was confident she had suffered cognitive difficulties or his assessment of the level of impairment.

[461] As to whether Dr James suffers PTSD or from an undiagnosed anxiety, that is a very difficult issue. Dr James' descriptions of her post-traumatic features to Dr Bell included, "I'll get a flashback of accident; often it's seeing him being flipped out of

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224 *Rossi v Westbrook & Anor* [2013] QCA 102 at [25]-[38], Fryberg J with Fraser and Gotterson JJA J agreeing.

225 (1774) 1 Cowp 63.

226 As to the inference see *Klein v SBD Services Pty Ltd* [2013] QSC 134 at [112]-[114].

his wheelchair and flying through the air and slamming into the ground".[227] It clearly was a traumatic event. Ms Daamen clearly found it to be so.

[462] The point of difference appears to be whether it could be regarded as a life-threatening event for Mr Chaffey, notwithstanding he continued the race. It was not put to Dr Bell that there was not such an event, nor was he asked to comment on Professor Whiteford's opinion. That said, he does not precisely identify the traumatic event which he relies upon for his diagnosis, but appears to adopt the traumatic event described by Dr James. Professor Whiteford's report was framed in terms of him not being able to confirm a diagnosis of PTSD, rather than excluding it. He however clarified his view that it did not meet the diagnostic criteria in cross-examination. Although of limited weight given Dr Georgius was not a psychiatrist, she considered the diagnostic criteria for PTSD were met by Dr James' presentation.

[463] Given both provide the same level of assessment of impairment of seven per cent as a result of the incident, the difference in diagnosis is not that significant. Although, it appears to be of some importance for Dr James who has not responded to PTSD treatment.

[464] Litigation has been accepted to varying degrees by different practitioners as potentially exacerbating either condition. I accept it does although I am unconvinced that at the end of litigation her symptoms will be markedly different.

[465] While Dr Bell diagnosed Dr James with PTSD, he did not define the traumatic event relied upon, although implicitly it was the event described by Dr James to him. That said, he was not challenged in cross-examination on his diagnosis after he stated that it was his diagnosis and not based on what he was told by Dr James. Professor Whiteford in cross-examination gave his basis for not concluding such a traumatic event within the diagnostic criteria had occurred, although he had left the question open in his report. Although I found both psychiatrists very credible, I am swayed to prefer Dr Bell's opinion given it receives some support from Dr Georgius and the fact that Professor Whiteford was not definitive in his report that Dr James' condition was not PTSD.

[466] I do consider that the incident was relatively causative of both of the conditions suffered by Dr James. Although she had suffered from ADHD prior to the incident, I accept the opinions of both Dr Bell and Dr Georgius, that Dr James' ADHD had stabilised. Notwithstanding the reference to it in the NDIS form, there is nothing to otherwise suggest it was a feature. Similarly, while Professor Whiteford had also referred to Dr James having been treated for premenstrual dysphoria, there was no evidence suggesting that that was a condition that actively contributed to her condition at the time. I accept Dr Bell's opinion in that regard.

Other medical issues

[467] I accept that Dr James' headaches are consistent with her injuries from the incident and connected her TBI and accept Dr Tsang's opinion in that regard.

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[227] Exhibit 22; See also T4-80/43-45, Ms Daamen described the incident as "… it looked like he'd been shot up the wall. They'd just gone so fast. He'd lost complete control of it, so it was extremely scary for me to see."

[468] Dr James gave evidence that she had no lasting issues from the injury to her ankle from the collision with the wheelchair, and that while she tried not to aggravate the shoulder, she did not consider it was a great issue, nor that she was in chronic pain.

[469] No medical opinions were provided as to the tinnitus and nuchal vertigo, although Dr James described the tinnitus as having begun soon after the incident. I accept she had symptoms, but do not find that they are a separate medical condition of any significance in the absence of medical opinion.

The O reports

[470] The fact that Dr James wrote the O reports does suggest some exaggeration may have occurred in relation to her symptoms of cognitive deterioration. It is also evident that she had continued to work in November while in the process of winding up her practice. I have discussed the O reports above. By the time the O reports were written Dr James was engaging in the PTSD program, which is consistent with her having given up work by that time. I am not however satisfied that the non-disclosure of the attendances by the O children was a deliberate attempt by Dr James to conceal the fact that she was working and able to do so when speaking to medical practitioners.

General damages

[471] The assessment of general damages in this case must take place within the dictates of the CLA and the CLR and, more particularly, Schedule 4 to the latter. As set out above, I am not satisfied Dr James established a claim under the ACL.

[472] For the purposes of the exercise required by the CLR, the court must select Dr James' "dominant injury".[228] In Schedule 8 ("Dictionary") to the CLR, "dominant injury" is defined as follows:

> "***dominant injury***, of multiple injuries, means—
>
> (a) if the highest range for 2 or more of the injuries of the multiple injuries is the same—the injury of those injuries selected as the dominant injury by a court assessing an ISV; or
>
> (b) otherwise—the injury of the multiple injuries having the highest range."

[473] Dr James submits that there are as many as four (4) candidates for the status of her "dominant injury", they being:

(a) the minor brain injury;

(b) the mental disorder;

(c) the cervical spine injury; and

(d) the lumbar spine injury.

[474] That said, the focus of the evidence was on the first two injuries, although Dr Tomlinson made an assessment of cervical spine and lumber spine injuries which

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[228] CLR sch 3, s 3(1).

Dr Atkinson assessed as zero WPI.[229] While Dr James had complained of a sore shoulder it was not the subject of any assessment by an orthopaedic specialist.[230] Dr James indicated that she was careful not to aggravate it but it is manageable and she is not in chronic pain.[231] Similarly while she had bruising on the ankle after the incident, it has recovered.[232] The evidence did not suggest the cervical spine and lumbar spine injuries were significant and had given rise to significant pain and suffering.

[475] I have found that Dr James has sustained a minor brain injury. It is therefore the injury which constitutes the "dominant injury", notwithstanding her psychological condition appears to be the more significant injury which is inhibiting her recovery. That is because Item 8 ("Minor brain injury") in schedule 4 of the CLR attracts a range of ISVs from six to 20 whilst –

(a) item 12 ("Moderate mental disorder") attracts a range of ISVs from two to 10;

(b) item 88 ("Moderate cervical spine injury—soft tissue injury") attracts a range of ISVs from five to 10; and

(c) item 93 ("Moderate thoracic or lumbar spine injury—soft tissue injury") also attracts a range of ISVs from five to 10.

[476] According to s 3(2) of schedule 3 of the CLR, the court may assess the ISV for the multiple injuries in the higher range of ISVs for the dominant injury of the multiple injuries other than the ISV the court would assess for the dominant injury, to reflect the level of adverse impact for the multiple injuries.

[477] Given the lack of permanent cognitive impairment arising from the mild TBI and the predominant feature being post traumatic amnesia. I find it contributes at least in part to Dr James' headaches. I consider the proper assessment would be in the lower part of the range at eight. I have taken into account Dr Tomlinson's WPI[233] in relation to the closed head injury which included Dr James' mental state, but for the reasons set out above I do not attach a lot of weight to it. However, the psychological injury suffered by Dr James is the significant debilitating injury from which she suffers which is supported by Dr Georgius, Dr Tsang and Professor Whiteford.

[478] Dr James submits that an ISV at the top of the range of ISVs (viz., an ISV of 20) ought to be selected, giving rise in turn to an award in general damages of $38,200. USM submits an uplift of six ISV points would be appropriate in light of the ISV range for a mental health disorder.

[479] The parties agree that if diagnosed as having an anxiety disorder or PTSD the mental health injury would fall in the moderate category, given Dr Bell and Professor Whiteford assess quantification of a seven per cent WPI under the psychiatric impairment rating scale ("**PIRS**").

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229 He considered that any pain would have been a soft tissue injury and settled within three to six months but contrary to Dr Tomlinson's observations did not see any evidence of spinal injuries when he carried out an examination.

230 I have given the assessment by Dr Tomlinson no weight.

231 T3-70 /16-19.

232 T3-70/1-4.

233 CLR sch 3, s 10.

[480] Dr James' injuries have impeded her enjoyment of life and caused her suffering. While she is able to carry out daily tasks, her organisational ability has been affected giving rise to anger and frustrations, including in her interactions with her sons. For the reasons set out below in this discussion of future loss I do consider there is some exaggeration by Dr James in terms of the impact of the injuries on her life. I don't accept the plaintiff's submission therefore that I should make the assessment on the basis of the ISV being 20.

[481] Given my findings above I do not accept the assessment should be as low as submitted by the defendant.

[482] I consider that an uplift of eight ISV points is appropriate to take account of the reasonably severe impact of Dr James' mental health disorder which also takes account of her other injuries. Therefore, I determine that the ISV would be 16 and the general damages as $28,800.

Interest on general damages

[483] Under the CLA no interest is payable on general damages.[234]

Past economic loss

[484] Included in Exhibit 6 is a schedule which records Dr James' earnings and income sources from FY2015 to the present day. The following details for FY2014 recorded in Dr James' personal income tax return for that year (also part of Exhibit 6) should be added to those entries:

(a) an amount of $43,168 in gross income from The Trustee for the Lock Family Trust from which tax of $9,042 was deducted, leaving a nett income of $34,126; and

(b) an amount of $106,936 by way of taxable income (after expenses) otherwise from practice;

representing total taxable earnings for that year of $150,104.

[485] As to past economic loss, Dr James submits that the court should find a clear causal association has been established between her accident-related injuries and the cessation of her participation in her professional practice. Dr James suggests there is no other reason why she would have put herself through applying for the pension, taking money out of her superannuation, seeking to participate in the NDIS and moving in with her ex-husband from whom she had separated.

[486] USM however contends that prior to the incident, Dr James' income was modest and impacted by the payments being made to the Department of Health under the agreement to pay back monies. Dr James was declared bankrupt in November 2018, which included the $103,000 debt payable to the Department of Health. According to Dr James, she would not have entered bankruptcy if she had not had the accident. USM contends that as Dr James cannot be placed in a better position financially than if the accident had not occurred, the debt must be deducted or taken into account in calculating her past economic loss and future loss if she was still paying

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234 CLA s 60.

it off. This is based on the fact that the debt which she had to repay was directly related to income and would have been deducted from further payments by way of income if she had continued to work. USM submits that there should be a minimal allowance for past income on the basis that the repayments would have entirely offset any net income otherwise derived after expenses and should be between nil and $25,000 with interest.

[487] Dr James contends that no other circumstance has been suggested which would have led to her ceasing practice. Dr James complains that it is not pleaded that the debt owing to the Commonwealth Department of Health "must be deducted or otherwise taken into account in calculating her past economic loss and future loss if she was still paying it off". As such, USM should not be permitted to raise such a case now.

[488] A plaintiff must demonstrate that his or her earning capacity has been diminished by the accident-caused injury and that that diminution or may be productive of financial loss.[235]

[489] Given the specific plea of past economic loss in [14(c)] of the FASOC in response to which USM plead that Dr James has not suffered an economic loss in the amount pleaded, or if she did suffer it and it is a much smaller amount. The matter was clearly in issue. While Dr James does have a valid complaint that USM should have pleaded that account needed to be taken of the Medicare debt as part of any calculation of income, USM clearly raised its intention to pursue this line in cross-examining Dr James and no objection was taken as that. The parties are therefore bound by the conduct of the case.

[490] Dr James' analysis of the data accumulated in the schedule of earnings and income sources shows that she generated the following total taxable earnings in the following years:

Fin Year	**Taxable**
FY2014	150,104
FY2015	157,424
FY2016	63,954
FY2017	14,601
FY2018	(1,424)

[491] Dr James contends that it is not true to say, with reference to the moneys received from the Department of Health (Medicare), that her pre-accident income "was clearly impacted … by the fact that it had been inflated by payments the plaintiff was otherwise not entitled to".[236] Dr James' evidence was that the services in respect of which the Department of Health sought the repayment of benefits were provided, the situation being that the benefits which were paid for the services were claimed on the wrong 'provider name'. They were however paid to her and according to Dr James, she paid psychologists a percentage under the arrangements

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235 *Nucifora & Anor v AAI Limited* [2013] QSC 338 at [30].

236 Defendant's outline of submissions at [183(b)].

that they had reached before receipt of the Medicare benefit in respect of each consultation, and that was paid into her account.[237] As such, the income was "earned" by Dr James as the percentage contributions by her psychologists as part of sharing the rooms in the practice she had established. In effect it appeared to be a service fee.

[492] It is submitted that Dr James, a highly qualified and well credentialed practitioner in her field, gave evidence about her plans for her professional future immediately before the accident occurred. Given that her twin sons were to start high school the following year in 2019 and she was divorced, it is likely she would have remained working.[238] While it was suggested by USM that Dr James went into bankruptcy as part of a deliberate strategy rather than due to the incident, I do not accept it nor that she would have been disqualified from practice for some other reason. It is a matter of speculation.

[493] Dr James further contends that USM should not now be able to argue when it is not pleaded that, because of her debt to the Department of Health, she would have gone bankrupt anyway and would have thereby been somehow disqualified from continuing to practice as a clinical psychologist, According to Dr James, a fair and conservative estimate of what she would have earned, in the notional situation had she not been injured, particularly having regard to the evidence of Dr Sonderegger,[239] is reflected in the table following:

Financial Year	**Taxable Income**	**Income Tax[240]**	**Nett Income**
FY2018	$50,000	$8,547	$41,453
FY2019	$150,000	$45,997	$104,003
FY2020	$220,000[241]	$76,497	$143,503
FY2021	$220,000	$74,067	$145,933

[494] USM refers to Dr Sonderegger's quoting a figure of $77,000 per annum (gross) as being the base wage of psychologists working full-time.[242] However, what the witness was referring to is the wage of "an employed junior clinical psychologist", which is in no way a description of Dr James. More comparable is what Dr Sonderegger had to say about the "expected income of a self-employed clinical psychologist" represented by an annual revenue of $250,000 less expenses of $30,000, yielding a taxable income of $220,000.[243]

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237 Or a family trust account. Presumably the amount paid out was claimed as a deduction.
238 T1-28/39-46.
239 T4-13/05-14.
240 Including Medicare levy.
241 Gross annual revenue of $250,000 less expenses of $30,000.
242 Defendant's submissions at [199]; cf. T4-12/09-22.
243 T4-13/05-14.

[495] As such, Dr James' past economic loss is calculable in accordance with the above premises as follows:

Dr James' notional income		
01.07.17 to 30.06.18	$41,453	
01.07.18 to 30.06.19	$104,003	
01.07.19 to 30.06.20	$143,503	
01.07.20 to 25.06.21[244]	$143,946[245]	$432,905
Less actual income from personal exertion		
01.07.17 to 30.06.18	$0	
01.07.18 to 30.06.19	$31,310[246]	
01.07.19 to 30.06.20	$0	
01.07.20 to 25.06.21	$0	$31,310
		$401,595

[496] Dr James contends that there is a causal association between her accident-related injuries and the cessation of her participation in her professional practice.

[497] The debt to the Department of Health related to the period between August 2013 and November 2015. Dr James agreed that if money was received during that period which was subsequently repayable to the Department of Health, it would have been reflected in her tax return for 30 June 2014, 30 June 2015 and 30 June 2016 if received as income during that year.[247]

[498] In any event, USM's argument assumes this debt would be offset against income rather than just an expense payable out of income such as a loan. That assumption is not made out. According to Dr James, she had an arrangement with her psychologists where she would be paid a percentage of each service and the Medicare benefit would be paid to her. Why one would structure the business arrangement in that way is perplexing. One would have thought that the individual psychologists would claim their fee and pay their service fee to Dr James on a regular basis. Although it was not unusual, according to Dr Sonderegger, to have psychologists in a practice paying a service fee. According to Dr James, whenever a client paid it went into her account or that of her trust, Lock Consultants. Under the arrangement, Dr James paid her psychologists the balance from the Medicare service up front and then she retained the subsequent Medicare reimbursements as they were processed. If that is so, the monies received from the services provided by the contracting psychologists would have been accounted for in her income and the

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244 Anticipated date of counsel's oral addresses.

245 360 days = 51.43 weeks at $145,933 ÷ 52.14 weeks = $2,798.87 nett per week.

246 Gross income of $34,369 minus income tax of $3,059 = $31,310. This is an inflated figure as it does not bring to account the expenses incurred by Dr James in generating this gross income.

247 T2-109.

payments paid by her to them presumably identified as an expense which would be a deduction.

[499] Thus, the fact Dr James had to repay monies on the basis they were claimed under a provider number for Dr James who had not herself provided the services, rather than the contracting psychologist, would have made no practical difference in her income. In those circumstances the debt repayable to the Department of Health does not establish that her tax returns are showing an inflated amount of income.[248] It is not therefore appropriate to reduce her anticipated income by the amount of the debt repayable to the Department of Health. The assumption of USM that the repayment of the unauthorised income derived would have offset any net income otherwise derived after expenses, is ill founded.

[500] That said, it does raise questions about Dr James' ability to efficiently run a practice.

[501] I am satisfied that it is unlikely Dr James would have filed for bankruptcy had the accident not occurred or would have been made bankrupt in any event, given there had been a payment plan entered with the Department of Health, although the risk that she could not meet those payments cannot be discounted.

[502] I am satisfied that Dr James could not continue to work due to her psychological condition after November 2018, as a result of which she closed her practice. While she did the reports for the O children in December 2018 her evidence which was unchallenged, was that she did not get paid for those reports. Whether her condition is described as PTSD or anxiety, I am satisfied that she was not able to continue to engage as a psychologist with patients.

[503] USM submits that the court should be cautious as to her record of income because she had not been forthcoming as to the income she received.[249] Dr James provided an affidavit exhibiting records of additional work post-dating the accident, which is Exhibit 54. According to her, by mid-2018 she did not have a bookkeeper and was not diligent with her record-keeping. Dr James deposes to further searches being carried out and further income that was earned and that to the best of her knowledge "there is no undisclosed income, paid or unpaid work." Dr James disclosed further records and deposed as to other sources of income and additional bank statements not previously disclosed or accounted for and together with her solicitors provided an additional schedule, SJ2, which she states represents all income she earned following the accident. She attributed that to her poor memory as well as her poor record keeping. The amount of income is significant being in the realm of $64,000 including $10,089.72 for October and November 2018. It does not appear to have been included in the schedule of income for the 2019 financial year, although it appears likely to have been included in the gross income for that year and is included in the set off in the figures provided by Dr James.[250]

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248 Whether as a result of the Department of Health claiming the debt of $103,000 she could have could have varied her tax return to show a reduced income as a result of the repayment was not the subject of evidence

249 Exhibit 54.

250 Exhibit 6.

[504] Given the affidavit provided, Dr James appears to have now substantially disclosed all details of her income earned. However, given the late disclosure and the poor practice records and accounting, I am circumspect about the figures with which I have been provided and while doing the best I can, will adopt a conservative view of Dr James' earnings.

[505] Dr Sonderegger gave evidence about the billing practices of psychologists and estimates of income, as well as the structure of practices. He said the common structure of psychologist practices was to contract psychologists who worked on commission of 64 to 90 per cent depending on experience, reputation and whether or not they had an established practice. He estimated that a senior psychologist, as Dr James would be, would earn $250,000 based on 1,000 patients per year at $250 for a 50-minute consultation. Based on the information disclosed in the further affidavit provided by Dr James as best as I can ascertain she appeared to generally charge $225 per hour. The evidence does not support a finding that she was capable of seeing 1000 patients a year based on her past earnings, notwithstanding her outside activities.

[506] According to Dr James' evidence, she wanted to move into the conduct of workshops with her Mind Body Wellness program which she had started to develop in 2017.[251] No evidence has been provided to me as to the prospects of such a business being established or its earnings. The estimated loss of earnings however is based on her continuing private practice as a psychologist and does not appear to seek to take into account any additional income from having other psychologists in the practice. I am satisfied on the balance of probabilities she would have continued in practice.

[507] The estimated income of Dr James notwithstanding the evidence of Dr Sonderegger is in my view ambitious when regard is had to her income in the years 2016 to 2018. In 2015, 2016 and 2017, Dr James' gross income from working in a private practice was $170,597, $59,128 and $126,061 respectively. This income was supplemented by Dr James providing counselling at the local catholic school, although in 2017 that only contributed $118. These actual figures are well short of $250,000, even taking into account the fact that Dr James was working for the Catholic Archdiocese and had been doing some pro bono work. For the 2018-year, gross income was $105,254. Taking into account the accident it appears that for 2018 Dr James would likely have earned at least the same as she earned in 2017. Given Dr James had taken on the role of President of the Australian Psychologists Society she appeared to be doing relatively well professionally. The Commonwealth debt related to a period up until November 2015. I therefore consider that the 2017 and 2018 years are the best guide as to her earnings in a private practice. While she may have earned more, her poor business practices suggest that she would not have earned the optimum she could have or significantly more than she had earned in 2017 and 2018

[508] I do not adopt USM's calculations as they are based on its contention on the assumption that the Commonwealth debt would have wiped out any income, adopting a global figure of nil to $25,000.[252]

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251 T1-38.

252 Based on the matters in the Defendant's submissions at [194].

[509] In my view, the appropriate measure to use for lost income is $150,000 gross income per annum which provides for an increase in income from that earned in 2017 year and taking account of the income she had earned in 2018. I will adopt $30,000 as expenses assuming that that was ultimately the share of expenses that she would have paid in the practice based on Dr Sondregger's figures.

[510] Based on that I estimate Dr James' past lost earnings are:

Financial Year	**Taxable Income**	**Income Tax[253]**	**Nett Income**
FY2018	$50,000	$6,387	$43,613
FY2019	$120,000	$34,117	$85,883
FY2020	$120,000	$31,687	$88,313
FY2021	$120,000	$31,687	$88,313

Dr James' notional income		
01.07.17 to 30.06.18	$43,613	
01.07.18 to 30.06.19	$85,883	
01.07.19 to 30.06.20	$88,313	
01.07.20 to 25.06.21	$88,313	$306,122
Less actual income from personal exertion		
01.07.17 to 30.06.18	$0	
01.07.18 to 30.06.19	$31,310	
01.07.19 to 30.06.20	$0	
01.07.20 to 25.06.21	$0	
		$274,812

Interest on past economic loss

[511] Interest will need to be calculated on the amount of lost earnings.

Past loss of employers' contributions to superannuation

[512] No claim.

Future impairment of earning capacity

253 Including Medicare levy.

[513] Dr James submits that it is unlikely that she will return to employment as a psychologist or at all in the next few years. In particular, reliance is placed on the evidence of Dr Georgius[254] and the fact that when she reviewed Dr James in 2020, Dr James had not improved. Dr Bell also considered that her incapacity to continue work is likely to be total and permanent. Professor Whiteford agreed that "unless there is a factor that can be removed, the anxiety disorder may persist for the foreseeable future."[255]

[514] Dr Atkinson did not consider that there was any constraint in her returning to work from his point of view, although he considered that problems were largely psychological.

[515] While Dr James' condition does seem to be severe compared to the nature of the injury concerned, the evidence of Dr Tomlinson, Dr Georgius, Dr Tsang and Dr Bell considered her presentation of symptoms were consistent with the injury suffered. I do however find that her fixation on having a TBI has led to some exaggeration by her of her capabilities.

[516] It is generally accepted that litigation is a stressor which can exacerbate a psychological condition. Professor Whiteford considers that this litigation is a major stressor that is affecting her. Dr James agreed in evidence that it was a source of stress. Dr Georgius is hopeful of improvement after litigation has ended but is not confident Dr James will see a rapid improvement.

[517] Dr James is a highly intelligent woman who has accrued many qualifications in furtherance of her career. While she experiences cognitive difficulties, I accept Dr Georgius' assessment that she is not cognitively impaired from her TBI. Notwithstanding that it was evident from Dr James' evidence that she is fixated on the fact that she has a TBI and does perceive it to be worse than perhaps it is, which seems to accord with her anxiety and expressed concern to a number of doctors, particularly Dr Georgius about her lack of improvement. I consider her psychological condition is likely to be exacerbating her cognitive difficulties as observed by Professor Whiteford.

[518] Dr James does maintain a desire to return to work, although she gave evidence that she would like to return to work if she could but considered with her psychological condition her options were limited.[256] Dr James also referred to the fact that the NDIS program in which she is participating is directed to her rehabilitation.

[519] While I do not think Dr James is motivated by a perceived injustice in relation to this litigation, I do think this litigation is adding to her general anxiety, not only from the stress of the process but the uncertainty that it brings. However, I have found that as a result of the accident it did cause PTSD. While the end of the litigation that may increase Dr James' prospect of her returning to some type of work post litigation, whether it be PTSD or a general anxiety disorder I find it is unlikely to resolve in the future given the opinions of Dr Bell and Professor Whiteford. It is unlikely to remove the major cause of her anxiety disorder, which

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254 T3-19 -T3-25.

255 T3-100/1-3.

256 Bearing in mind Dr Georgius' observation that people who suffer psychological conditions often lose the motivation to work, especially if it is not in their chosen field.

Professor Whiteford considered would continue for the foreseeable future. To date Dr James has been resistant to treatment for PTSD. Her psychological condition characterised by Dr Bell as PTSD and Professor Whiteford as a general anxiety disorder had manifested by the time she first saw Dr Georgius, prior to this litigation commencing.

[520] I do not consider it is likely that she will return to working as a psychologist seeing patients given her psychological condition, which has not improved despite treatment.[257] Given her age, and taking account of the fact that there is some chance that she will be able to return to employment and has potentially some capacity to earn income which will improve with the end of this litigation, at least in a role such as a personal trainer and the usual contingencies I consider a discount of 30 per cent is the appropriate level of discount.

[521] For the reasons set out above I am not satisfied Dr James would have achieved the income at the level identified by Dr Sonderegger and have adopted annual earnings of $150,000 per annum less expenses of $30,000.

[522] Were one to discount at five per cent per annum[258] an ongoing loss of $1,693.77 nett per week over the remaining 15 years (multiplier 555.0) of what would otherwise have been Dr James' working life expectancy to age 70, a figure of $940,040.56 is realised.

[523] A discount of 30 per cent produces an award of $658,028.39.

Future loss of employers' contributions to superannuation

[524] No claim.

Past care and services

[525] No claim.

Future expenses (including services and assistance)

[526] Dr James claims that she has a need for care and assistance as well as consumables, the cost of which will be satisfied through the NDIS. However, Dr James will be obliged to contribute to such cost due to the "compensation reduction amount", as assessed by the NDIA, via either a refund to the NDIA or the operation of a preclusion period during which she will be obliged to self-fund the portion of NDIS services which is compensable in damages.

[527] A plaintiff is to be placed in the position they would have been if no wrong had been committed against them by the award of compensatory damages. That may include expenses that were or will in the future be necessary for the plaintiff's condition.

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257 Although Professor Whiteford states that the treatment for an anxiety would be different from treatment for PTSD he did not offer any real prospect that Dr James' condition would change even if treated for anxiety.

258 See *Civil Proceedings Act 2011* (Qld) s 61.

[528] The claim has not been framed specifically in terms of a claim for gratuitous services. In order to recover such services, it must be shown such services are necessary services as a result of the injury suffered due to the wrong. It is the need for such services which gives rise to Dr James being entitled to an award of damages in respect of such services.[259]Section 59 of the CLA now provides particular constraints before damages for gratuitous services are recoverable which do not accord with the approach of the NDIA.

[529] Dr James submits that the evidence relating to her present needs can be determined from the breakdown of the amounts contained in Exhibit 42 that, for the period of 423 days from 24 March 2020 to 21 May 2021, and conformably with her NDIS plan, a total of $176,544.17 was expended in meeting her present needs. Dr James contends that will then be looked at to calculate future needs. Breaking down the figure of $176,544.17 to a weekly figure represents $2,961.69 per week. Discounting that amount over Dr James' life expectancy of 31 years produces a figure of $2,469,457 which should be discounted to reflect contingencies by 20 per cent.[260] While that was the approach of Jackson J in determining the level of future care in *McQuilty v Midgley & Anor* his Honour in that case did have some evidence of the level of care required.

[530] USM submits there is no proper basis to adopt the amount expended under the NDIS plan or authority correlating to the amount casually related to the loss. It submits that there is no independent assessment of needs, and none has been undertaken at least at this stage by the NDIA.

[531] Mr Huezo, a representative of the NDIA, gave evidence that an assessment is made based upon the evidence of medical and health practitioners often provided by the participant rather than independently obtained. Mr Heuzo stated that there are three initial criteria which must be satisfied by any person to join the scheme, namely, age, residency and disability, and conceded there is then a degree of subjectivity/discretion exercised by the agency in determining the amount of a person's package and what it relates to.[261]

[532] Mr Huezo noted the assessment process by the NDIA officers as to the size of the package, how it is formulated and what it represents is a different assessment to that undertaken by the court.[262] Mr Huezo confirmed that following a declaration by the court as to future damages, the NDIA has an internal formula to determine the "compensation reduction amount" which reduces the payment a person will receive under the NDIS.[263]

[533] The package provides for various supports to be provided to the participant which will not necessarily be the subject of compensation at common law. For example, Dr James had her support coordinator in court with her on one occasion. No evidence was provided as to whether such a service was rendered necessary as a result of the injuries suffered.

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259 *Van Gerven v Fenton* (1992) 175 CLR 327 at 333-4.
260 Plaintiff's submissions at [107], adopting the approach of Jackson J in *McQuilty v Midgley & Anor* [2016] QSC 36 at [239].
261 Transcript 4-52/4-14.
262 T4-53.
263 T4-54.

[534] Mr Huezo confirmed that the value of Dr James annual plan was an amount of $216,264.47. of which Dr James had utilised $176,544.17.[264] The plan is self-managed, and it is within the discretion of the participant as to how it is used. The fact that the participant chooses to expend money on certain items does not establish that they are casually linked to the injury suffered.

[535] The evidence establishes that Dr James applied for the NDIS as a result of the injuries she suffered. Dr James contends that the package serves as a guide to compensate her in the future with an appropriate discount, because if it was not for the incident, she would not have had to obtain the NDIS package. However, the parameters of the needs of a participant are driven by reports of health practitioners as well as the participant themselves[265] Mr Heuzo conceded that as part of this process, medical professionals may provide divergent views as to an applicant's situation.[266] Those reports have not been identified as being part of the evidence before this court. Mr Heuzo conceded that "there is an independent assessment program in the works…But that hasn't been widely rolled out as of yet".[267] To the extent Dr Cash completed the form identifying the impairment and types of assistance needed he was not called. Dr Cash identified ADHD as an additional impairment for which Dr James requires stimulant medication.

[536] The assumption that the amount paid under an NDIS plan simply equates to the compensable expenses including for services and assistance is evidence of the amount payable as part of a damages claim is a misconception. That there is a link between the disability for which the NDIS plan provides an amount for services as a result of the disability and the injuries suffered as a result of the incident may be accepted. However, the amount provided for services does not necessarily equate to compensable needs. What the money the subject of the plan is spent on is within the discretion of the recipient. In her submission to the NDIA, Dr James identifies services which she thinks will improve her wellbeing,[268] but they do need necessarily equate to a need suffered as a result of the injuries suffered. While it may include amounts for services or expenses for needs which are reasonably necessary as a result of the injuries suffered, however I do not consider that the amount of the payment under the NDIS plan in the circumstances provides an evidential basis for the determination of future expenses. While the plaintiff has provided for a generous discount to take account of the fact some of the expenses in the package would not be compensable that does not overcome the fact that the evidence does not establish the threshold requirement that it is a compensable that what is claimed is causally linked to the injuries suffered and reasonably necessary. The onus is on the plaintiff.

[537] A review of the schedule provided of payments made is not on its face obviously required as a result of the injuries incurred. The proper approach should have been for Dr James to prove the need for services or expenses which are reasonably necessary as a result of the injuries suffered, not to ask the court to assume that the assessment by the NDIA is the value of the needs of her as a result of her injuries

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264 T4-56.
265 Exhibit 37.
266 T4-52/40-47; 4-53, 27-36.
267 T4-52/32-48.
268 See, for example, Exhibit 38: Social community and civic participation to engage in community/social or recreational activities within the community.

that have been rendered reasonably necessary for her condition. Had Dr James approached the question in this way, the NDIA would then be able to assess whether any of those amounts were included under the NDIS plan.

Future medical expenses

[538] It is apparent from the report of Dr Bell that Dr James will require ongoing treatment for PTSD which the evidence supports is the principal condition from which she suffers which will require ongoing treatment. He estimated the costs of treatment were $24,800, including medication.[269] He considered that treatment of a general practitioner, psychiatrist and psychologist would be a two-year program.[270] While Professor Whiteford's diagnosis is of a general anxiety disorder he did not cavil with the fact she would require ongoing treatment, only that it would be different treatment from PTSD.

[539] I will therefore award an amount of $30,000 for future medical expenses.

NDIS recoverable charge amount

[540] The NDIA may issue a charge to recover money paid out in the past. Dr James claims the amount that may be the subject of recovery by the NDIA. USM however contends that no amount should be included in any award of damages. In particular USM contends that there is no evidence of the content of the NDIS plan being casually linked to the loss.

[541] The NDIA maintains an entitlement to exercise its charge at a figure of $176,544.17.[271] Mr Heuzo confirmed that was the amount of funds directly paid out as part of Dr James' plan was $176,544.17,[272] and that this was the amount cited in the NDIA's letter of 21 May as being the estimated recoverable amount if Dr James succeeded in litigation.[273]

[542] That does not necessarily mean it will do so. Whether reimbursement is sought by the NDIA is subject to the CEO's discretion which is designed to ensure the NDIS will not duplicate funding for supports that are or should have been funded by a compensation claim. Mr Heuzo confirmed that as Dr James could remain an NDIS participant until at least the age of 65, it is possible for the recoverable amount to increase over time.[274]

[543] Pursuant to s 104 of *National Disability Insurance Scheme Act 2013* (Cth) ("**NDISA**") the CEO by written notice may require the participant or prospective participant to take action specified to claim or obtain compensation. Section 104 (3) and (4) provide that:

[544] Section 11(a) of the NDISA defines "compensation" to mean a payment in respect of compensation or damages in respect of personal injury.

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269 Exhibit 22.
270 T3-87.
271 Exhibits 39 and 42.
272 Transcript 4-58/14-24.
273 Transcript 4-48/33-40; T4-55/5-12.
274 Transcript T4-49/37-41; T4-50/18-29.

[545] There is no evidence of a notice having been given under s 104 NDISA.

[546] Sub-sections 106(1) and (2) of the NDISA provide that:

> **"Recovering past NDIS amounts from certain judgements**
>
> (1) This section applies if:
>
> (a) an amount of compensation is fixed under a judgement (other than a consent judgement) given in respect of a personal injury that has caused, to any extent, a participant's impairment (whether or not the participant was a participant at the time of the injury); and
>
> (b) before the day of the judgement, NDIS amounts (the past NDIS amounts) had been paid in respect of supports in relation to the participant's impairment; and
>
> (c) the judgement specifies a portion (the past NDIS support component) of the amount of compensation to be a component for supports of a kind funded or provided under the National Disability Insurance Scheme.
>
> (2) An amount (the recoverable amount) is payable by the participant to the Agency. The recoverable amount is an amount equal to:
>
> (a) unless subsection (4) or (5) applies--the sum of the past NDIS amounts, reduced as mentioned in subsection (3) (if applicable); or
>
> (b) if subsection (4) or (5) applies--the amount worked out in accordance with whichever of those subsections is applicable."

[547] Section 108 of the NDISA provides that the amount payable by a person under s 106 is a debt due by the person to the agency.

[548] Section 109 of the NDISA provides that:

> "**CEO may send preliminary notice to potential compensation payer or insurer**
>
> (1) If:
>
> (a) a participant or prospective participant makes a claim against another person (the potential compensation payer) for compensation; and
>
> (b) the claim relates to the participant's or prospective participant's impairment;
>
> the CEO may give written notice to the potential compensation payer, stating that the CEO may wish to recover an amount from the potential compensation payer.
>
> (2) If:

(a) a participant or prospective participant makes a claim against another person (the potential compensation payer) for compensation; and

(b) the claim relates to the participant's or prospective participant's impairment; and

(c) an insurer may be liable, under a contract of insurance, to indemnify the potential compensation payer against any liability arising from the claim for compensation;

the CEO may give written notice to the insurer, stating that the CEO may wish to recover an amount from the insurer.

(3) A notice under subsection (1) or (2) must contain:

(a) a statement of the potential compensation payer's or insurer's obligation under subsection 110(1) or (2), as the case requires; and

(b) a statement of the effect of section 111 (recovery) so far as it relates to the notice."

[549] No notice under s 109 has been provided.

[550] Sub-sections 111(1), (3) and (4) of the NDISA provides that:

"CEO may send recovery notice to compensation payer or insurer

(1) If:

(a) one or more NDIS amounts have been paid to a person in respect of a participant's impairment; and

(b) a person (the compensation payer):

(i) is liable to pay compensation to the participant in relation to the impairment; or

(ii) if the compensation payer is an authority of a State or Territory--has determined that a payment by way of compensation is to be made to the participant in relation to the impairment;

the CEO may give written notice to the compensation payer that the CEO proposes to recover from the compensation payer the amount specified in the notice.

…

(3) If a compensation payer or insurer is given notice under subsection (1) or (2), the compensation payer or insurer is liable to pay to the Agency the amount specified in the notice.

(4) The amount to be specified in the notice is the lesser of the following:

> (a) an amount equal to the sum of the NDIS amounts referred to in paragraph (1)(a) or (2)(a);
>
> (b) an amount equal to the recoverable amount in relation to the judgement, consent judgement or settlement to which the liability relates."

[551] Section 116 NDISA provides an overall discretion to the CEO not to enforce provisions for repayment if it is considered appropriate to do so in special circumstances.

[552] The difficulty is that the NDIA has not committed to a position as to whether or not it will seek recovery of the amount already paid under the NDIS scheme.[275] Dr James contends that it will in all likelihood do so based on exhibit 39 and 42. Those exhibits only identify the amount paid out and the fact that the NDIA may claim part of the compensation.

[553] The evidence of Mr Huezo did not give any further clarity to the position.

[554] Dr James had the benefit of an NDIS package, and the evidence supports the fact that services have been provided. The application completed by Dr Cash suggests it was sought based on the injuries suffered in the accident, but it is apparent there were medical reports provided which were not the subject of evidence in this court.[276] However the Court has found that Dr James has suffered a minor brain injury and PTSD as a result of the incident, which is referred to in the supporting evidence form.[277] However there is no evidence of the link between Dr James' conditions and the services provided.

[555] The assessment by the NDIA was not the same criteria as the provisions for assessing damages. Further Mr Huezo stated that the amount of the package is assessed differently from the court and the amount paid by the NDIA may not be the amount sought under any charge.

[556] The recoverability of a charge remains a matter within the discretion of the agency. As has been pointed out in other decisions and academic writings the situation is highly unsatisfactory. Medicare can provide an amount which should be refunded in advance of a trial. It is not evident why the NDIA cannot do so. While counsel for Dr James can be assured that a charge reflecting payments made by the NDIA will issue, that is not a sufficient basis for the court to conclude it will issue.

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275 Which was the subject of comment by Johnson J in *AB by her tutor Mb v State of New South Wales* [2018] NSWSC 765 and Lonergan J in *Sharp v Home Care Service of NSW* [2018] NSWSC 1319 in the context of a settlement. In neither case did the NDIA clarify whether and, if so, in what amount they sought to recover amounts paid. No amounts were ordered. In the latter case, her Honour concluded there was no basis for there to be any amount to be recovered. In both cases the court made comment that if the NDIA considered a payback was due that the CEO consider exercising his or her discretion under s 116 of the Act not to seek repayment: see Sharp at [51]. Johnson J stated that since the NDIS had not provided a committed position the court did not need to consider it: see [17]

276 Although reference was made to ADHD.

277 Exhibit 41.

[557] I was referred to no cases to assist me in this regard. While I note that Justice Henry included an amount for an NDIS charge in the damages in *Towers v Hevilift Ltd*,[278] that was by agreement.

[558] In the circumstances I am not satisfied that there is sufficient evidence of a claim being made by the NDIA. The NDIA should take into account the Court's position in this regard in determining whether it would be appropriate to issue a notice after judgment is given, particularly as steps were taken by the plaintiff to try and resolve the position of the NDIA prior to trial.

[278] [2020] QSC 77.

Past expenses otherwise

[559] Dr James claims an amount of $70,202.90 as recorded in Exhibit 7, all of which is compensable. USM points out that amounts are included which prima facie are not clearly matters which have not been established to be compensable. For instance, it includes amounts for supplements, NAC Gold Adult membership, running shoes and a distance professional training programme. I will reduce the amount payable to $65,000.

Interest on out-of-pocket expenses

[560] In calculating interest on past special damages, there must be brought to account the amounts of the benefits paid by Medicare Australia ($14,224.17) and Dr James' private health insurer, Teachers' Health ($15,684.20). This means that interest should be calculated on only $65,000 minus ($14,224.17 + $15,684.20 = $29,908.37) = $35,091.63

[561] Allowing 5 per cent per annum on $35,091.63 over 1,188 days yields $5,710.80.

Summary

[562] To summarise, Dr James' damages ought to be compensable as follows:

Head of Claim	**Amount**
General damages for pain, suffering and loss of amenities:	$28,800
No interest payable	$0
Past economic loss	$274,812
Interest to be calculated by the parties	$0
Past loss of employer's contributions to superannuation	$0
Future economic loss and impairment of earning capacity	$658,028.39
Future loss of employers' contributions to superannuation	$0
Past gratuitous care and services	$0
Future expenses (including services and assistance)	$30,000
NDIS charge for past expenses	$0
Past special damages otherwise	$65,000
Interest	$5,710.80
	$1,062,351.20

[563] As the basis on which I have calculated damages differs from the position submitted by the parties I will allow the parties to check the above calculations and to submit an order within fourteen days of the date of these reasons.

[564] The parties should provide submissions as to costs within fourteen days of the date of these reasons.

Orders

[565] The parties are to provide a draft order by which the defendant is to pay the plaintiff damages, having checked the calculations in [562] of these reasons, within fourteen days of the date of these reasons.

[566] The parties should provide submissions as to costs within fourteen days of the date of these reasons.